SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1]

IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

No. 480

In the Matter of Petition for Naturalization Filed by MARTIN LUDWIG COHNSTAEDT

NOTICE OF APPEAL TO THE SUPREME COURT—Filed August 21, 1948

To the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri

Please take notice that the Petitioner, Martin Ludwig Cohnstaedt, appeals from the judgments of this Court made on the 18th day of August, 1948, overruling the Petitioner's Motion for Judgment According to the Court's Conclusions of Law and Finding of Facts; the Petitioner's Motion for a New Trial, and from the order of the Court on June 21, 1947, refusing to permit the Petitioner to take the oath of naturalization.

Martin L. Cohnstaedt, by (S.) Laurence S. Holmes, his Attorney of Record, 209 Orpheum Building, Wichita, Kansas.

[File endorsement omitted.]

[fol. 2] IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

No. 480

In the Matter of Petition for Naturalization Filed by MARTIN LUDWIG COHNSTAEDT

PROOF OF NOTICE OF APPEAL

STATE OF KANSAS,
County of Sedgwick, ss:

Comes now the Affiant, Laurence S. Holmes, and upon oath states that, acting on behalf of the Petitioner, Martin Ludwig Cohnstaedt, he caused to be deposited in the United

States Mail today, properly addressed and stamped, a copy of the Notice to Appeal marked Exhibit "A", attached hereto, and addressed the same to the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri, that being the last known address to the Affiant of the Respondent, and that it is located outside of the State of Kansas.

Further Affiant saith not.

(S.) Laurence S. Holmes, Affiant.

Signed, subscribed, and sworn to before me, a notary public, this 19th day of August, 1948. (S.) Mozelle Humphrey, Notary Public. (Seal.) My commission expires April 8, 1941.

[File endorsement omitted.]

[fol. 3] In the District Court of Barton County, Kansas

No. 480

In the Matter of Petition for Naturalization Filed by Martin Ludwig Cohnstaedt

Journal Entry on Motions for Judgment, New Trial and Attorney's Fee—Filed August 18, 1948

Now on this 18th day of August, 1948, upon proper notice to the U. S. Department of Justice, Immigration and Naturalization Service, 819 U. S. Courthouse, Kansas City, Mo., came on for hearing the Petitioner's motion for judgment in accordance with the Court's findings of fact and conclusion of law, and the Petitioners motion for a new trial.

The Court, after hearing the arguments of Laurence S. Holmes, attorney representing the Petitioner and the arguments of C. J. Long, who was present representing the United States Department of Justice, Immigration and Naturalization Service finds that said motions should be and the same are hereby overruled.

The Court then proceeded to hear the motion of Laurence S. Holmes for counsel fees. After hearing the arguments of both parties the Court finds that Laurence S. Holmes

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should be allowed an attorneys fee of $100 in addition to the statutory fee of $25 for his extended legal services rendered the Petitioner in the Barton County District Court of Kansas. The Court hereby approves said fee with the proviso that this shall not be intended to cover any services of an appellate nature in superior courts.

(S.) Roy J. McMullen, Judge of the District Court.

O. K. (S.) C. J. Long, of the Immigration and Naturalization Service of the United States Department of Justice, Examiner.

[fol. 4] (S.) Laurence S. Holmes, Attorney for Petitioner Martin Ludwig Cohnstaedt.

[File endorsement omitted.]

Certificate of Copy

STATE OF KANSAS,
Twentieth Judicial District,
Barton County, ss:

I, A. J. Bortz, Clerk of the District Court of the Twentieth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of papers in the case entitled In the Matter of Petition for Naturalization filed by Martin Ludwig Cohnstaedt, No. 480, in the therein entitled cause, as the same remains on file and of record in my office.

Witness my hand, and the seal of said court, affixed at my office in Great Bend, this the 11th day of September A. D. 1948.

A. J. Bortz, Clerk, District Court, by —— ——, Deputy. (Seal.)

[fols. 5-6] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization

Appeal from the District Court of Barton County, Kansas,

The Honorable Roy J. McMullen, Judge

Abstract of Record

ABSTRACT OF PLEADINGS

The Petition filed by Martin Ludwig Cohnstaedt in Naturalization case No. 480 in the District Court of Barton County, Kansas, alleged: that Martin Ludwig Cohnstaedt resided at 434 North Broadway, Sterling, Kansas, that he was twenty-nine years of age, having been born on October 12, 1917, at Frankfurt-am-Main, Germany, (Prussia), and stated that his present nationality was German. It alleged further that he was married to Rebecca Jane Boone on October 14, 1943, at Lumberton, Robeson County, North Carolina, disclosed that one child had been born named [fol. 7] William Martin Cohnstaedt on March 10, 1945, at Charlottesville, Virginia, and that said child was residing with the Petitioner at Sterling, Kansas. The Petition further disclosed that the Petitioner's last place of foreign residence was in England, that he made lawful entry into the United States at New York on April 27, 1937, having landed on the SS "Normandie".

The Petition further declared "It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am subject or citizen, and it is my intention to reside permanently in the United States; I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized govern-

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ment; I am able to speak the English language; and I am, and have during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

The Petition further disclosed that the Petitioner had resided since August 27, 1946, at 434 North Broadway, Sterling, Kansas and that a prior Petition for naturalization had been filed on March 20, 1945, at Charlottesville, Albemarle County, Virginia, and there dismissed for want of prosecution.

[fol. 8] The Petition concluded with the following language: "I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name, So Help Me God."

Attached to the Petition was the joint Affidavit of two witnesses, to-wit: Rebecca Jane Cohnstaedt, wife of the Petitioner, and Mrs. Helen Strickler, a housewife, residing in Sterling, Kansas. The Affidavit stated that to the personal knowledge of the Affiants the Petitioner had resided immediately preceding in the United States since the last date mentioned, and that they had personal knowledge the Petitioner was then and had been during all such periods of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of United States, and in their opinion was in every way qualified to be admitted a citizen of the United States.

The Petition was filed in the District Court of Barton County, Kansas, on May 13, 1947. The Petitioner was notified by one M. F. Lence, of the Immigration and Naturalization Service of the United States Department of Justice, that the Naturalization Examiner, found, after the designated administrative hearings, that the Petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law."

[fol. 9] The Petitioner demanded a formal hearing before the Naturalization Court of Barton County, Kansas, which hearing was held on November 18, 1947, in the District Court of Barton County, Kansas. At that time, a formal recommendation that the Petition of the Petitioner, Martin Ludwig Cohnstaedt, be denied over the signature of Michael McCaul, a U. S. Deputy Naturalization Examiner, was entered. The Court proceeded to hear the testimony of the Petitioner and his witnesses on that date. This testimony begins on p. 8 of the Abstract. The matter was briefed to the trial Court and on February 28, 1948, the following Decision of the Court was entered:

DECISION OF FEBRUARY 28, 1948

"This matter came on before the court on the 18th day of November, 1947, on the Petition of Martin Ludwig Cohnstaedt, for Naturalization, such petition being opposed by the U. S. Naturalization Service on the ground that the Petitioner had not established attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law.

"The petitioner appeared in person, and by his attorney, Laurence S. Holmes, of Wichita, Kansas, and the U. S. Naturalization Service appeared by Michael McCaul, Examiner.

"Thereupon, said Petitioner introduced his evidence, and the matter was argued to the Court by counsel and the Examiner and the Court gave the Petitioner leave to file a Brief.

"Now, on this 28th day of February, 1948, the Court, having heard the argument of counsel, having read the transcript, of the proceedings, and the brief of Petitioner, and being fully advised in the premises, finds that under the authority of *Girouard v. U. S.*, 328 [fol. 10] U. S. 61, 66 Sup. Ct. Rep. 826, and other citations in the Brief of the Petitioner, that said Petitioner should be admitted to citizenship of the United States, and that upon said Petitioner taking the oath as required by law, said Petitioner will be admitted to citizenship."

(Signed) Roy J. McMullen, Judge of the District Court of Barton County, Kansas.

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Later a Motion for Judgment in the above entitled case was filed on June 21, 1948, another Motion for Judgment in Accordance with the Court's Finding of Facts and Conclusions of Law was filed on June 21, 1948. On June 23, 1948, the Court entered another Order denying the Petition for Naturalization. No reasons were given.

Because of the denial of the Petition the Court refused to administer the oath of allegiance as required by the Nationality Act of 1940. A Motion for a New Trial was filed on June 23, 1948 by the Petitioner Appellant, the reasons set forth are as follows:

"(1) Because of abuse of discretion of the Court;

"(2) Erroneous rulings of the Court;

"(3) That the decision was given under the influence of passion or prejudice;

"(4) That the decision is in part or in whole contrary to the evidence."

On August 18, 1948, the Motion for a New Trial was argued and the Motion for Judgment was argued, and the Court made the following Journal Entry:

[fol. 11] "Now on this 18th day of August, 1948, upon proper notice to the U. S. Department of Justice, Immigration and Naturalization Service, 819 U. S. Courthouse, Kansas City, Mo., came on for hearing the Petitioner's motion for judgment in accordance with the Court's findings of fact and conclusions of law, and the Petitioner's Motion for a New Trial.

"The Court, after hearing the arguments of Laurence S. Holmes, attorney representing the Petitioner and the arguments of C. J. Long, who was present representing the United States Department of Justice, Immigration and Naturalization Service finds that said motions should be and the same are hereby overruled.

"The Court then proceeded to hear the motion of Laurence S. Holmes for counsel fees. After hearing the arguments of both parties the Court finds that Laurence S. Holmes should be allowed an attorneys fee of $100.00 in addition to the statutory fee of $25.00 for his extended legal services rendered the Petitioner in the Barton County District Court of Kansas. The Court hereby approves said fee with the proviso that

this shall not be intended to cover any services of an appellate nature in superior Courts."

(Signed) Roy J. McMullen, Judge of the District Court.

O. K. (Signed) C. J. Long of the Immigration and Naturalization Service of the United States Department of Justice, Examiner.

(Signed) Laurence S. Holmes, Attorney for Petitioner, Martin Ludwig Cohnstaedt.

[fol. 12] On August 20, 1948, a Notice of Appeal to the Supreme Court was filed with the clerk of the Barton County District Court, a copy of which follows:

NOTICE OF APPEAL TO THE SUPREME COURT—Filed August 20, 1948

To the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri:

Please take notice that the Petitioner, Martin Ludwig Cohnstaedt, appeals from the judgments of this Court made on the 18th day of August, 1948, overruling the Petitioner's Motion for Judgment According to the Court's Conclusions of Law and Finding of Facts; the Petitioner's Motion for a New Trial from the order of the Court on June 23, 1947, refusing to permit the Petitioner to take the oath of naturalization.

Martin L. Cohnstaedt, by Laurence S. Holmes, his attorney of Record, 209 Orpheum Building, Wichita, Kansas.

On August 20, 1948, Proof of Notice of Appeal was filed in the Barton County District Court, a copy of which follows:

[fol. 13] PROOF OF NOTICE OF APPEAL

STATE OF KANSAS,
County of Sedgwick, ss.

Comes now the Affiant, Laurence S. Holmes, and upon oath states that, acting on behalf of the Petitioner, Martin Ludwig Cohnstaedt, he caused to be deposited in the United

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States Mail, properly addressed and stamped, a copy of the Notice to Appeal marked Exhibit "A", and attached hereto, and addressed the same to the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri, that being the last known address to the Affiant of the Respondent, and that it is located outside of the State of Kansas.

Further Affiant saith not.

Laurence S. Holmes, Affiant.

Filed Aug. 20, 1948.

Verification

My commission expires:

The Notice of Appeal and Journal Entry of Judgment was acknowledged by the Clerk of the Supreme Court of Kansas on September 13, 1948. A cost deposit was filed within thirty days.

Direct examination.

By Mr. Holmes:

Q. State your name to the court.
A. Martin Ludwig Cohnstaedt.
[fol. 14] Q. Where were you born, Mr. Cohnstaedt?
A. Frankfurt-am-Main, Germany.
Q. What year?
A. 1917.
Q. You are a male?
A. Yes.
Q. Color; race?
A. Considered white.

Mr. Holmes: I assume you will stipulate as to his physical description?

Mr. McCaul: All of this, of course, is of record, and in the court.

Mr. Holmes: It isn't necessary to go all over that.

Q. Now, Mr. Cohnstaedt, will you tell the court your age when you emigrated from Germany?

A. Yes, Mr. Holmes, I left Germany in 1934 and went to England; lived in England for three years, and emigrated from England to this country.

Q. In what year?

A. In 1937.

Q. Did your family emigrate from Germany about 1934?

A. My father did.

Q. What was your father's occupation?

A. He was a journalist.

Q. What was the occasion for his leaving the country?

A. He had left the country in 1933 at the occasion of the accession — Hitler to power, the downfall of the German republic.

[fol. 15] Q. And he proceeded to get his family out of the country as soon after that as he could?

A. Yes, sir.

Q. Now, when did you say you came to the United States?

A. In April, 1937.

Q. At that time, you were twenty years old, I believe?

A. Yes, sir.

Q. Where did you reside at that time?

A. My first residence in this country, after a short time in New York City, I went to live in Pennsylvania, on a farm in Pennsylvania.

Q. Will you tell the court in as brief a manner as you can, where you have lived, and the jobs you have worked at in the intervening years from 1937 until the present time?

A. When I arrived on April 22, if I recall right, in 1937, in New York City, within three days, I filed a petition for naturalization, and then left New York City to work on a farm in Pennsylvania, Bucks County, Pennsylvania. I worked on that farm until September, 1937, when I entered Rutgers University, the State University of New Jersey, in a four-year college course in agriculture. During the years while I went to school, I worked on farms in New Jersey, Pennsylvania, Wisconsin, and South Carolina.

Q. In what capacity did you work?

A. As a farmhand.

[fol. 16] Q. Very well; go ahead.

A. In June, 1941, I graduated from Rutgers University with a B. S. in Agriculture, and spent one more summer on a farm in Wisconsin, working as a farmhand, and then entered the University of North Carolina in the fall of 1941, doing graduate work in Economics and Sociology. In December, 1942, I wound up my studies in Chapel Hill, North Carolina, at the University, and went back to work on a

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farm in Pennsylvania. Then I was asked to go into dairy herd improvement work; took a short course at Pennsylvania State College, and started working in April, 1943, in Virginia, and I worked for the Dairy Herd Improvement Association for eighteen months.

Q. What was that organization?

A. Dairy Herd Improvement Association under the supervision of the farm county agent of Charlottesville, Virginia. During the summer, during the late summer of 1944, I learned of the urgent need of the Mountain Mission School nearby in the Blue Ridge hills of Virginia. They needed more staff members to carry on the care of underprivileged children of the city slums of Virginia, mostly broken homes, children of broken homes, and I changed my work, occupation, and became an agricultural teacher and house father at that Mountain Mission school. I stayed there from September, 1944, until June 1945. I omitted to mention I was married in October, 1943, and in March, 1945, my first son was born in Charlottesville, Virginia, where I filed my first petition for final naturalization in Charlottesville, Virginia.

[fol. 17] Q. What happened to that?

A. I think the case was taken under consideration by the Supreme Court and the Department of Justice suspended all naturalization cases pertaining to the same—in the same field of the Girouard case until the Supreme Court had passed decision on it. So, in July, 1945, I went to work in the Mountain Mission School as an agricultural teacher. The School sent me as one of the representatives on a cattle trip to take cattle and horses to Poland under the auspices of the United Nations Relief and Rehabilitation Administration in February of 1946. That was relief work to carry livestock to Poland. On my return from that trip it was agreed upon that I should like to have my occupation at the school and continue to serve in the capacity as supervisor for the UNRRA on further trips to Poland. I made two more trips during 1946, and in August, 1946, I received an urgent request, if I were interested, to come to Sterling, Kansas, to teach in College, Sterling College. I accepted the offer and have been living in Sterling, Kansas, since September, 1946.

Q. Teaching in what school?

A. The Sterling College.

Q. That is where you are now employed?

A. That is where I am now employed. Soon after I came here, your Honor, I inquired what had happened to my petition for final naturalization, since the Girouard case had been handed down.

Q. Just a minute; let us do this by question and answer. Now, who did you marry in 1943?

A. Rebecca Jane Boone.

[fol. 18] Q. What nationality was she?

A. American.

Q. You are still married to her, and she is present in the courtroom at this time?

A. Yes, sir.

Q. Have you ever been convicted of a felony?

A. No, sir.

Q. Have you ever been charged with the commission of a felony?

A. No, sir.

Q. Have you ever been charged or convicted, either one, of any misdemeanor?

A. No, sir.

Q. Do you subscribe to the principles enunciated in the Constitution of the United States of America?

A. Yes, sir.

Q. Are you willing to renounce your allegiance to the German State?

— —

Q. Were you a citizen of Germany by birth?

A. I was, by birth.

Q. Do you agree to support and defend the Constitution and the Laws of the United States against all enemies, foreign, and domestic, and to bear true faith and allegiance to the same?

A. Yes, sir.

Q. Do you make that statement without any mental reservation?

A. Yes, sir.

Mr. Holmes: You may cross examine.

[fol. 19] Cross-examination.

By Mr. McCaul:

Q. Can you take an oath?

A. Yes, sir.

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Q. What?
A. Affirmation.
Q. Only an affirmation?

Mr. McCaul: We will get to the points that are the basis for the findings of the Immigration and Naturalization Service in this case. I think we can cover it most briefly by just calling to the attention of the court the questions and answers made October 21, 1947, at Lyons.

Mr. Holmes: Just a minute. Is it your intention to introduce that deposition in evidence?

Mr. McCaul: Well, I haven't yet. If you would like, we will.

Mr. Holmes: That is your side of the case.

Mr. McCaul: I will submit that this be accepted as evidence in the case.

A. May I ask a question?

Mr. McCaul: There is no objection?
Mr. Holmes: Go ahead.

(Whereupon a document was marked as Immigration Service Exhibit 1, by the Reporter.) (See Ab. pp. 29-36)

Mr. McCaul: To get it specifically before the court, there are a few things——

[fol. 20] Mr. Holmes: Just at this moment, let me ask some questions about this deposition to see if it is properly before the court.

Mr. McCaul: It would probably be proper on cross examination.

Mr. Holmes: Well, is the deposition before the court?

Mr. McCaul: It is now. It has now been introduced. You said you had no objection.

Mr. Holmes: No, I did not say that. I object to the introduction of the deposition.

Q. At the time you testified at Lyons on October 21, 1947, you were reminded that on April 9, 1947, at Hutchinson, Kansas, you testified before Examiner McCaul, and that you stated that you believed the existence of armed services were not necessary in a Christian Nation; is that correct?

A. That I stated that?

Q. Yes.

A. Yes, sir.

Q. That is your statement, and you stated on this date, October 21, 1947, that that statement was correct. The next question:

> "Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?"

Your answer was "Yes." Was that question asked, and that answer given?

A. Yes, sir.

[fol. 21] Mr. McCaul: That is the idea—just to go over some of these things that are admitted.

Q. The question was asked:

> "Q. Are you an ordained minister?"

Your answer was "No". You added: "I am a member of the Society of Friends which has no ordained ministers." Was that question asked and the answer given?

A. Yes.

Q. Also the question:

> "Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: 'any relief of suffering or any effort of a constructive nature which did not require entering the Armed Forces.' Will you explain in more detail what you mean by that answer?"

And your answer:

> "A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs."

Was that question asked, and that answer given?

A. Yes sir.

Q. Then the Question:

> "Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever."

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[fol. 22] The answer:

"A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict."

Was that question asked and that answer given?

Q. This question—I will ask if this question was asked and this answer given:

"Q. Did it meet with your approval for the United States to send arms and munitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?"

Answer:

"A. It did not. I was opposed to that."

Mr. Holmes: I object to that.

The Court: Overruled.

Q. Was that question asked and that answer given?

A. Yes.

Q. Was this question asked, and this answer given?

"Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?"

Answer:

"A. No."

[fol. 23] Was that question asked and that answer given?

A. Yes, sir.

Q. Now, here is a question and answer:

"Q. In the event it should be permissable in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?"

Answer: A. "Yes."

Was that question asked and that answer given?

A. Yes, sir.
Q. Another question:

"Q. In the event it should be permissable in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?"

Answer: "A. No."

Was that question asked and that answer given?
A. Yes, sir.
Q. This question and answer:

"Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?"

Answer: "A. No."

Was that question asked and that answer given?
A. Yes, sir.
[fol. 24] Q. Here is a question and answer:

"Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?"

Answer:

"A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces."

Was that question asked and the answer given?
A. Yes, sir.
Q. Question:

"Q. If you were a minister could you wear the uniform as a chaplain?

Answer:

"A. No, because chaplains are members of the armed services."

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Was that question asked and the answer given?
A. Yes.

Mr. McCaul: I am through cross-examining.

By the Court:

Q. Your sentiments are still the same today as they were when you answered those questions?
A. Yes, sir.

[fol. 25] By the Court:

Q. How old a man are you?
A. Thirty years old.
Q. Married?
A. Yes, sir.
Q. How many children?
A. Two children.
Q. How old are they?
A. Two years, and seven months, and three months.
Q. What part did you take in what was commonly known as World War Two; were you drafted?
A. Yes, sir—what do you mean by—I was subject to the law, and I appeared before the local draft board.
Q. What happened?
A. They recognized my conscientious objection to war on the basis of the Selective Service Act in 1940 and 1941, and gave me a 4-E classification, which is a conscientious objector, to object to participate in war and joining the armed forces of the country. The law provides for national work, work of national importance under the direction of the local draft board, wherever I went.

Recross Examination:

By Mr. McCaul:

Q. You don't mean to say under the direction?
A. Under the supervision.

Mr. Holmes: Your Honor please, we would like to complete the proffer of proof.
[fol. 26] The Court: All right.
Mr. Holmes: Unless they will admit the residence and if they will stipulate that the issue in this case, and the

commissioner's recommendation is based solely on the answers to these questions.

Mr. McCaul: Well, it is based on the statute, expressed in his answers to those questions.

Mr. Holmes: Those questions you just read to him?

Mr. McCaul: Do you want those made of record?

Mr. Holmes: That is correct. Yes.

Mr. McCaul: They are made a part of the record.

Mr. Holmes: I want to get correctly whether it is necessary to put on supporting witnesses in support of his testimony?

Mr. McCaul: This is a matter of conscience. He only can testify to it, and we haven't raised a question of character. We are not opposing him on the ground of character. It is this point of failing to show an attachment to the principles of the Constitution, as we think it means.

Mr. Holmes: Will you so stipulate then, to that statement you just made.

Mr. McCaul: He has it. I am bound by my statement, as far as my authority goes.

The Court: I want to ask some questions myself.

Q. Work that was acceptable would excuse you from service?

A. Exactly, sir.

[fol. 27] The Court: Anything additional?

Mr. Holmes: I believe, in view of the record, that the Government has stipulated that their only objection to his petition in the matter alleged therein has to do with the specific questions that have been asked on cross examination—that being the case, I believe I am safe in resting and that we have proven our points. If the court cares to hear argument in support of that, I am prepared to present it at this time, unless the Government has additional evidence that they want to offer in rebuttal.

The Court: It is necessary for this gentleman to become a citizen of the United States that he take the full oath, or affirmation?

Q. Now, in regard to the answers to the questions as submitted by the Naturalization Service. They have made an investigation, and they are coming into this court, recommending to this court that your application be denied.

A. Yes, sir.

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Q. And they are supposed to make this investigation without prejudice, to make it fairly, and from all of the information that they can obtain, or that they have obtained about you, aren't they?

A. Yes.

The Court: This court would be inclined to follow the recommendation as set forth by the representatives of the Federal Naturalization Service.

Mr. Holmes: Would counsel for the petitioner be permitted to cite to this court authority which is contrary to [fol. 28] the position the Immigration Service has taken?

The Court: Yes.

H. A. KELSEY, called as a witness on behalf of the petitioner, having been first duly sworn according to law, on oath testified as follows:

Direct examination.

By Mr. Holmes:

Q. Will you state your name and position to the court?

A. H. A. Kelsey.

Q. What is your profession?

A. President-Emeritus of Sterling College.

Q. Are you acquainted with the petitioner in this case, Martin Ludwig Cohnstaedt?

A. I am.

Q. Under what circumstances and for how long have you known him?

A. Since August, 1946.

Q. Have you heard the testimony that he gave in this hearing immediately prior to your taking the stand?

A. Yes.

Q. Are you familiar with the position that he takes in regard to the answers asked on cross examination by the Immigration Examiner?

A. I am.

[fol. 29] Q. Is it your opinion that he is sincere and conscientious in making those answers?

A. I believe so, yes, sir.

Q. Do you consider that his position which is disclosed by those answers is taken from his religious beliefs?

A. Yes, that is it.

Q. Do you know him to be of good moral character?

A. Yes, sir.

Q. And to reside in Sterling, Kansas?

A. Yes, sir.

By the Court:

Q. You have known him since August, 1946?

A. Yes, I have been in correspondence with him.

Q. You have seen him how often since that date, about?

A. Once a week, possibly.

Q. Have you ever heard anything discussed in regard to his morals or habits, or anything of that sort?

A. No.

Q. Neither one way or the other, have you?

A. Well, he has a positive Christian influence in the community, if that is what you mean.

By Mr. Holmes:

Q. You are the man who hired him to teach at Sterling, at the time you were president?

A. Yes.

[fol. 30] Q. You believe he is attached to the principles of the Constitution of the United States?

A. There is no reason to doubt it. I certainly wouldn't have employed him if I had.

Q. Do you know his reputation in the community?

A. Yes.

Q. What is that reputation?

A. It is very good.

The Court: That is, you mean by that that he has a good reputation for obeying the laws, staying sober, probably, telling the truth, and paying his bills?

A. Yes, and he takes part in the activities of the community which are constructive.

Cross-examination.

By Mr. McCaul:

Q. You heard his testimony a while ago?

A. Yes.

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Q. Do you agree with him that you would be willing to have all the laws providing for armed defense of this country repealed?

A. No, sir.

Mr. Holmes: To which we object as not being an issue in this case.

The Court: Overruled.

A. I don't agree with him.

Q. Do you think his objection to wearing the uniform of one of the armed forces in a noncombatant capacity is justified?

[fol. 31] Mr. Holmes: I make objection to this line of questioning.

The Court: I don't believe that will be necessary. I think I understand the gentleman's position, Mr. McCaul.

(Witness excused.)

Frank C. Richard, called as a witness on behalf of the petitioner, having first been duly sworn according to law, on oath testified as follows:

Direct examination.

By Mr. Holmes:

Q. State your name and occupation?

A. Frank C. Richard, minister.

Q. Of what denomination?

A. Congregation Christian Church.

Q. Where do you hold a pastorate?

A. Partridge, Kansas, and for the Kansas State Reformatory.

Q. The Kansas State Reformatory at Hutchinson?

A. Yes.

Q. Are you acquainted with this petitioner, Martin Cohnstaedt?

A. I am.

Q. Under what circumstances have you become acquainted with him?

A. He came to my office about last March for some help in the Institute of Rural Life.

[fol. 32] Q. What is the Institute of Rural Life?

A. A conference on Rural Life work out at Sterling.

Q. What has been the nature of your association with him since that time?

A. I assisted in the planning of the next Institute, met with the committee, and have met him several times in between, planning the Rural Life work.

Q. Do you consider that you know him fairly intimately?

A. As intimately as is possible within a brief time. I have been associated with him in this work.

Q. Now, this Rural Life Association is primarily a religious or secular organization?

A. It is neither secular nor religious. It isn't one or the other.

Q. I don't quite understand the nature of the organization?

A. It is simply an institute in the interests of the rural life work, both religious and secular, whatever you want to call it.

Q. Now, you heard the petitioner testify on the stand, immediately prior to your taking the stand?

A. I did.

Q. Do you consider that you know the petitioner well enough to judge whether or not he is sincere in making the answers to those questions he was asked on cross examination?

A. I think so.

Q. Do you know his reputation?

A. Only since I have become acquainted with him.

[fol. 33] Q. State to the court what that reputation is?

A. I have known him as a man who is very much interested and vitally interested in the constructive forces of the community in rural life work, and economics, and Christian idealism.

Q. Is he considered of a high moral character by the community, as you observed?

A. In so far as I know.

Q. How far is that?

A. Well, he lives in Sterling.

The Court: I think he has told you that.

Mr. Holmes: Very well.

Mr. McCaul: There is no question by the examiner.

(The Witness was excused.)

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(Whereupon, the court announced that the attorney for the petitioner would be given ten days' time, after the furnishing of a transcript by the Reporter, to file a brief with the court, at which time the matter would be passed upon without further hearing.)

* * * * * * *

Immigration Service Exhibit 1

K. C. File No. 1100-13011

Statement under affirmation of Martin Ludwig Cohnstaedt on October 21, 1947, At Lyons, Kansas, before Michael McCaul, U. S. Naturalization Examiner:

Examiner to Alien:

[fol. 34] Q. You are advised that I am a Naturalization Examiner of the Immigration and Naturalization Service, Department of Justice, and as such I am authorized by law to hear your sworn testimony pertaining to your qualifications for naturalization. Any statement you may make may be held against you in any action civil or criminal. Are you willing to testify?

A. (Affirmed.)

Q. Are you the same person who filed petition for naturalization No. 480 on May 13, 1947, at Great Bend, Kansas?

A. Yes.

Q. On April 9, 1947, at Hutchinson, Kansas, you testified before me and you stated that you believed the existence of Armed Service is not necessary in a Christian nation. Is that correct?

A. Yes.

Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?

A. Yes.

Q. Are you an ordained minister?

A. No. I am a member of the Society of Friends which has no ordained ministers.

Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: "Any relief of suffering or any effort of a constructive

[fol. 35] nature which did not require entering the Armed Forces." Will you explain in more detail what you mean by that answer?

A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs.

Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever?

A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict.

Q. In time of war would you be willing to render any and all services for which you may be physically able to render in furtherance of the war effort of the United States which would not necessitate the wearing of the uniform of one of the armed forces and which would not necessitate the bearing of arms?

A. Only as qualified in my answer to the question next above.

Q. Did it meet with your approval for the United States to send arms and ammunitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?

A. It did not. I was opposed to that.

Q. Are you glad Germany was defeated in the recent war?

A. I was opposed to Nazism in Germany from its inception and I would be pleased if Germany were freed from it but I do not believe it has been nor has it been benefitted [fol. 36] directly in any way by the war. I also believe the United States has lowered its resistance to Nazi influence because of having expended its energies in an attempt to resist Nazism by armed force.

Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?

A. No.

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Q. What, if anything, did you do or try to do in furthering the war effort of the United States during the recent war?

A. Whatever I did would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort. My work was teaching agriculture, testing butter fat and working in UNRA which work was at all times of national importance and acceptable to my draft board.

Q. In the event it should be permissible in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?

A. Yes.

Q. In the event it should be permissible in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?

A. No.

[fol. 37] Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?

A. No.

Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?

A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces.

Q. If you were a minister could you wear the uniform as a chaplain?

A. No because chaplains are members of the armed services.

(S.) Martin L. Cohnstaedt.

Subscribed and affirmed to me before me this 21st day of October, 1947. (S.) Michael McCaul, Naturalization Exam.

Certificate of Counsel

The foregoing is a true and correct abstract of testimony in the case necessary to a determination of the questions involved.

Laurence S. Holmes, Counsel for Petitioner.

[fol. 38] In the Supreme Court of the State of Kansas

No. 37531

In the Matter of the Petition of Martin Ludwig Cohnstaedt for Naturalization

Appeal from the District Court of Barton County, Kansas,

The Honorable Roy J. McMullen, Judge

Supplemental Abstract of Appellant

Specifications of Error

1. The order of the Court denying the Petition for Naturalization on June 23, 1948. (See page 5 of Abstract).

2. The order of the Court on August 18, 1948, overruling the Motion for Judgment in Accordance with the Court's Finding of Fact and Conclusions of Law. (See page 6 of Abstract)

3. The overruling of the Court on August 18, 1948, of the Appellant's Motion For a New Trial. (See page 6 of Abstract)

Certificate of Counsel

The foregoing is a true and correct Supplemental Abstract in the above entitled case.

Laurence S. Holmes, Counsel for Petitioner.

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[fol. 39] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization, Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE, Appellee

Counter Abstract of Appellee

In the District Court of Barton County, Kansas

Form 25 1133

ORDER ESTABLISHING RULE DAYS

Order establishing rule days for the hearing of petitions for naturalization in the District Court for Barton County, at Great Bend, Kansas.

In conformity with the terms of Section 6 of the Naturalization Act of June 29, 1906, 34 U. S. Stat. L., 596, the following days are fixed as stated days for the hearing of petitions [fol. 40] for naturalization in the District Court for Barton County, at Great Bend, Kansas, on which dates, and no other, final action will be taken on applications for citizenship in this court. All rules heretofore existing fixing dates for final hearings in naturalization cases are hereby abrogated:

The 1st Day of the June and November terms, being the 1st Tuesday in June and the 3rd Tuesday in November, of each year, respectively, all petitions being subject to call at 10:30 A. M.

Immediately following the filing of each and every petition for naturalization, the Clerk of this Court shall post the same for hearing to the first rule day that will admit of at least ninety days posted notice being given the public, and will, at the time, inform the applicant and his witnesses of the date of such final hearing.

Each and every applicant for citizenship shall, as a matter of right, be entitled to one continuance in his case, but in the event he fails to prosecute his case to a final hearing on the second hearing day, said petition shall, without further notice to said applicant, be forthwith dismissed for

non-prosecution. Continuances shall be from rule day to rule day.

The Clerk of Court shall enter this rule of record, and will transmit a copy thereof to the Naturalization Service, 410 Custom House, St. Louis, Missouri, for its files.

Done this 11 day of September, A. D. 1925.

(S.) Ray H. Beals, Judge Presiding.

[fol. 41] CERTIFICATE OF COUNSEL

The foregoing is a true and correct Counter Abstract in the above entitled case.

V. J. Bowersock, Assistant United States Attorney, District of Kansas, Topeka, Kansas, Attorney for Appellee.

[fol. 42] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37,531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization, Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE, Appellee

OPINION—June 11, 1949

Syllabus by the Court

1. Following Girouard v. United States, 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084, it is held that an alien who is willing to take the oath of allegiance and to serve in the army as a noncombatant, but who, because of religious scruples, is unwilling to bear arms in defense of this country, may be admitted to citizenship.

2. A petitioner whose evidence disclosed that in time of war he would not willingly work in a munitions factory and assist in the manufacture of munitions for the purpose of destroying enemy forces whose aim it would be to destroy the armed forces of the United States, nor would he deliver ammunition to men at the front who were engaged in combat duty, is not entitled to be admitted to citizenship.

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3. The record examined, and *held*, the trial court did not err in refusing to admit the petitioner to citizenship in the United States.

Appeal from Barton district court; Roy J. McMullen, judge. Opinion filed June 11, 1949. Affirmed.

[fol. 43] Laurence S. Holmes, of Wichita, argued the cause and was on the briefs for the appellant.

V. J. Bowersock, assistant United States attorney, district of Kansas, argued the cause, and Lester Luther, United States attorney, district of Kansas, was with him on the briefs for the appellee.

[fol. 44] The opinion of the court was delivered by

Thiele, J.: Martin Ludwig Cohnstaedt, hereafter referred to as the petitioner, filed his petition in the district court of Barton County, Kansas, to become a naturalized citizen of the United States. The prayer of his petition was denied and he perfected his appeal to this court.

In a preliminary way it is observed that under article 1, section 8, of the Constitution of the United States, the Congress shall have power to establish "an uniform Rule of Naturalization" and that it has done so, by an act which provides that a person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed and not otherwise (U.S.C. Title 8, § 701 [b]) and that petitions for naturalization may be filed and shall be docketed the same day as filed, but that final action thereon shall be had only on stated days to be fixed by the rule of the court (U.S.C. Title 8, § 732 [d]). Under previous like statutes the rule of the Barton county district court fixed the first days of the June and November terms, being the first Tuesday in June and the third Tuesday in November in each year as the days for hearing petitions for naturalization and on which dates, and no others, final action would be taken on applications for citizenship.

On May 13, 1947, the petitioner filed his petition and was later examined by an official of the naturalization service, who found that petitioner should not be naturalized. Later, and on November 18, 1947, which was the day fixed by the rule, a hearing was had, at which time the government's adverse recommendation was filed and petitioner and his [fol. 45] witnesses testified, and petitioner was given leave to file a brief, and that was done. On February 28, 1948, which was not a rule day, the trial judge filed a written

memorandum or decision that under the authority of Girouard v. United States, 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084, petitioner should be admitted to citizenship upon taking the oath. On June 21, 1948, the petitioner filed his motions for judgment and on June 23, 1948, the trial court entered its order denying the petition for naturalization. Petitioner's motion for a new trial was denied, and he filed his notice of appeal.

Petitioner makes some contention that the ruling or decision of the trial court of February 28, 1948, was a final order, and not having been appealed from became a finality, and our attention is directed to certain of our decisions, which need not be reviewed, for they are not in point here. While it is true that jurisdiction to confer citizenship through naturalization proceedings is conferred upon the state court (U.S.C. Title 8, § 701), the procedure to be followed is that fixed under that act. The Barton county district court had fixed rule days on which dates and no others, final action would be taken on applications for citizenship. The decision of February 28, 1948, was not on such a date and cannot be given the finality which the petitioner seeks to attribute to it.

Petitioner's principal contention, as stated by him, is that he submitted sufficient evidence to the trial court to show that he is attached to the principles of the United States Constitution; that he is a person of good moral character; that he has met all of the requirements of citizenship and his petition should have been granted, and his brief is [fol. 46] devoted to a development of that contention, our attention being directed to the evidence and to certain decisions of the Supreme Court of the United States. At the oral argument petitioner made it clear that he was relying upon the principles laid down in Girouard v. United States, supra, and he conceded that if his evidence did not meet the test set forth in that case the judgment of the trial court should be affirmed.

Prior to 1946 the Supreme Court of the United States had held that an alien who refused to bear arms would not be admitted to citizenship. See United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889; United States v. MacIntosh, 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; and United States v. Bland, 283 U. S. 636, 51 S. Ct. 569, 75 L. Ed. 1319. In an opinion handed down

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in 1946, however, that court in Girouard v. United States, reconsidered the question, held that the three cases noted above did not state the correct rule of law, which in substance is that an alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant, but who because of religious scruples is unwilling to bear arms in defense of this country, may be admitted to citizenship.

Petitioner contends his evidence showed him to have met the test of the last mentioned case. Assuming that his evidence is to be fully credited, it showed the following. Petitioner was born in Germany in 1917, went to England in 1934, came to the United States in 1937, attended various schools in the United States and since 1946 has been a teacher in Sterling College at Sterling, Kansas. Testimony as to petitioner's character and reputation need not be detailed. [fols. 47-49] On his direct examination petitioner stated he subscribed to the principles enumerated in the Constitution of the United States, and that he agreed to support and defend the Constitution and laws against all enemies and to bear true faith and allegiance to the United States, and that he made such statements without mental reservations. On cross-examination, a verified statement containing questions asked by an official of the naturalization service and petitioner's answers was introduced into the record and petitioner was examined with respect thereto. No purpose will be served by detailing this examination. Summarized, petitioner stated he believed the existence of armed services was not necessary in a Christian nation, and that he was willing to have repealed all laws providing for armed services; that he was not an ordained minister but was a member of the Society of Friends; that he was willing to perform any duty which the government required which did not conflict with his religious beliefs, but that he could not contribute anything to be used solely and directly in furtherance of armed conflict; that he was opposed to sending arms and ammunition to our allies in the recent war; that he was not willing to work in a munitions factory in time of war and assist in manufacture of munitions for the purpose of destroying enemy forces whose aim would be to destroy the armed forces of the United States; that in event of war, if it should be permissible for civilians to remove the wounded from a battlefield he would do so, but he would

not deliver ammunition to men at the front who were engaged in combat duty. Other evidence need not be noted.

We think the above makes it clear that petitioner is not willing to serve in the army as a non-combatant, and that he is not entitled to be admitted to citizenship; that the trial court did not err in so concluding, and that its judgment should be and it is affirmed.

[fol. 50] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization

Appeal from the District Court of Barton County, Kansas

The Honorable Roy J. McMullen, Judge

APPELLANT'S MOTION FOR RE-HEARING—Filed July 1, 1949

The Appellant-Petitioner, Martin L. Cohnstaedt, respectfully moves this Court for an order granting a rehearing on this cause for the reasons set out hereafter.

I

In support of this motion for rehearing and on the procedu-al point, (See Appellant's Brief, p. 37 et seq.) this Court declared that "final" action on a naturalization case could only be taken on stated days as fixed by the rule of the lower Court. Now a glance at the rule of Judge Beals, (See Appellee's Counter Abstract, p. 2), made on September 11, 1925, provided that the first day of June and November terms should be the day on which all final actions on applications for citizenship would be taken. But the 1943 legislature changed the beginning days of the terms of the District Court of Barton County so that the November terms started on the first Monday of November, (See 1947 Supp. G.S. 20-1020). Thus under Judge Beals' rule one of the proper days for naturalization cases to be finally acted on in 1947 would have been on November 3, 1947, instead of November 18 when this Petitioner was notified by the Immigration Service of the United States Department

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[fol. 51] of Justice to appear before the lower Court for his final hearing.

This Petitioner-Appellant suggests that the language used by the Court in its opinion as it now stands would jeopardize every decree of naturalization granted by the Barton County District Court under its mistaken calculation of the application of the "Nationality Rule day" of Judge Beals' order, or contrarywise that the Barton County District Court had jurisdiction of the parties and subject matter and exercised its judicial power over it by hearing evidence, taking the matter under advisement and deciding the basic issue, (See Appellant's Abstract, p. 4). This latter position, the Petitioner-Appellant suggests, is the better rule of law, for fundamental to our Anglo-Saxon system of jurisprudence is the doctrine of finality of judgment —there must be an end to litigation. Certainly this Petitioner has demonstrated in his brief that the lower Court's order and findings of February 28, 1948, was an appealable order and final in that sense (in the sense that that term is used in our Kansas procedural acts. See Appellant's Brief, pages 36, 37, 38, 39, and 40.) for certainly at that time the United States Department of Justice could have sought Appellant review.

The Restatement of the Law of Judgments of the American Law Institute, Sections 1, 2, and 3, dealing with personal judgments, judgments in rem, and judgments quasi in rem, all state the rule that "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the [fol. 52] validity of the claim and any issue actually litigated in the action shall not be litigated again by them." Notice particularly Comment a. under Section 1. of the Restatement. Comment d. under Section 1. points out that this rule is applicable only if a final judgment is rendered in the original action.

Section 41 of Judgments in the Restatement read as follows: "The rules of res judicata are not applicable where the judgment is not a final judgment." Comment a. thereunder states, "For the purposes of the rules stated in this Subject a judgment at law is not a final judgment if further

judicial action by the court rendering the judgment is required to determine the matter litigated . . . ".

If these principles as set forth in the Restatement of the law of judgments are applied by this Court to the issues raised by the Petitioner rightly or wrongly, then the lower Court decided all of the issues of law and fact in this case in its order of February 28, 1948, (See Appellant's Abstract, p. 4), and since this was not appealed from by the unsuccessful party within the statutory time the order must stand. (See Appellant's Brief, pages 37, 38, 39, 40 and 41.)

Further this Petitioner-Appellant wishes to point out that "final action" as the term is used in the 1940 Nationality Act, (United States Code, Title 8, 732, (d)), would be the swearing in or refusing to swear in a naturalization petitioner, but does this mean that a naturalization Court could not take the matter under advisement and pass on all the issues of law and fact irrevocably in the interval between "rule days"? The Petitioner submits that this is not the correct rule of law.

[fol. 53] II

In support of this motion for rehearing and concerning the substantive law of this case—namely the application of the Girouard case, 328 U. S. 61, to the facts of the one at bar, this Petitioner-Appellant asserts that if the Girouard case reversed the principles set forth in the Rosa Schwimmer decision than it certainly means that Martin Cohnstaedt is a suitable person to become a citizen. It is important to notice that footnote of the dissenting opinion of Justice Stone contained in that opinion (See 90 L. Ed., page 1092, or 66 Supreme Court, p. 831.) This note reads as follows: "In the opinion of the writer there was evidence in United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889, from which the district court could and presumably did infer that applicants behavior evidenced a disposition, present and future, actively to resist all laws of the United States and lawful commands of its officers for the furthering of any military enterprise of the United States, and actively to aid and encourage such resistence in others, and this the district court presumably concluded evidenced a want of attachment of the applicant to the principles of the Constitution which the naturalization law requires to

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be exhibited by the behavior of the applicant preceding the application for citizenship.

See also the portion of the majority opinion by Justice Douglas, in which he points out that the naturalization oath is substantially the same as all public officials take—Federal and State. Martin Cohnstaedt would be competent to take such an oath.

The Petitioner-Appellant wishes to point out that the distinction made by the Kansas Court here is the same as [fol. 54] saying that only the MacIntosh, 283 U. S. 605, and Bland, 283 U. S. 636 decisions were reversed by the Girouard decision, supra. This is contra to the express language in the Girouard decision. (See Appellant's Brief, p. 51). Rosa Schwimmer said, "I am an uncompromising pacifist—I am willing to do everything that an American citizen *has* to do except fighting—I am not willing to bear arms, etc. . . ." Now certainly there is no evidence contained in the answers that Martin Cohnstaedt gave in the trial of this case that indicates he would refuse to do anything required by the United States laws of him, but as was pointed out in the Petitioner-Appellant's original Brief (See Petitioner-Appellant's Brief, pages 52, 53 and 54).

The Circuit Court of Appeals for the 7th Circuit in the case of Schwimmer v. United States, 27 Federal Reporter, 2nd Serie, which ruled on the Schwimmer case before the United States Supreme Court did, details at some greater length the position that Rosa Schwimmer took. In concluding the Court says that Rose Schwimmer should have been admitted to citizenship:

"Women are considered incapable of bearing arms, Male persons of the age of appellant have not been compelled to do so. Appellant, if admitted, cannot by any present law of the United States be compelled to bear arms. Judging by all of the conscription acts of which we have knowledge, she never will be required to do so; yet she is denied admission to citizenship because she says she will not fight with her fists or carry a gun.

"In other words, there is put to her an hypothetical question—what would she do under circumstances that never have occurred and probably never will occur—and upon [fol. 55] her answers to this supposed case her petition is denied. A petitioner's rights are not to be determined by putting conundrums to her.

"The views of appellant relied upon to support the denial of her application have no substantial relation to the inquiry authorized by the statute. They were immaterial to that inquiry and do not furnish sufficient basis for the decree.

"Reversed and remanded, with direction to grant appellant's petition."

Yet the Rosa Schwimmer Supreme Court opinion has been specifically overruled. (See the Girouard case supra.)

Similarly Martin Cohnstaedt had a number of conundrums proposed to him as to how he would act in situations that have as yet not existed within the laws of the United States.

The one all pervading question that this Petitioner-Appellant desires to ask this court is—how, in the light of various facts and beliefs, in the doctrine of pacifism disclosed in the Schwimmer, Bland, MacIntosh, and Girouard cases, can this court say that only potential members of the Armed Forces, either combatant or non-combatant, are entitled to become United States citizens when the laws of Congress recognize and have for sometime the fact that there are certain religious minority groups of its own citizens whom it will not compel, though it may have the power to do so, to fight in its Armed Forces, and that it has not deemed it politically wise to attempt a labor draft even at the height of World War II?

[fol. 56] Therefore this Petitioner-Appellant respectfully suggests that this Court should grant a rehearing on the issues in his case.

Martin Ludwig Cohnstaedt. By Laurence S. Holmes, his Attorney, Orpheum Building, Wichita, Kansas.

DENIAL OF REHEARING—July 8, 1949

By the Court:

July 8, 1949—Denied.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this application.

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CASES CITED

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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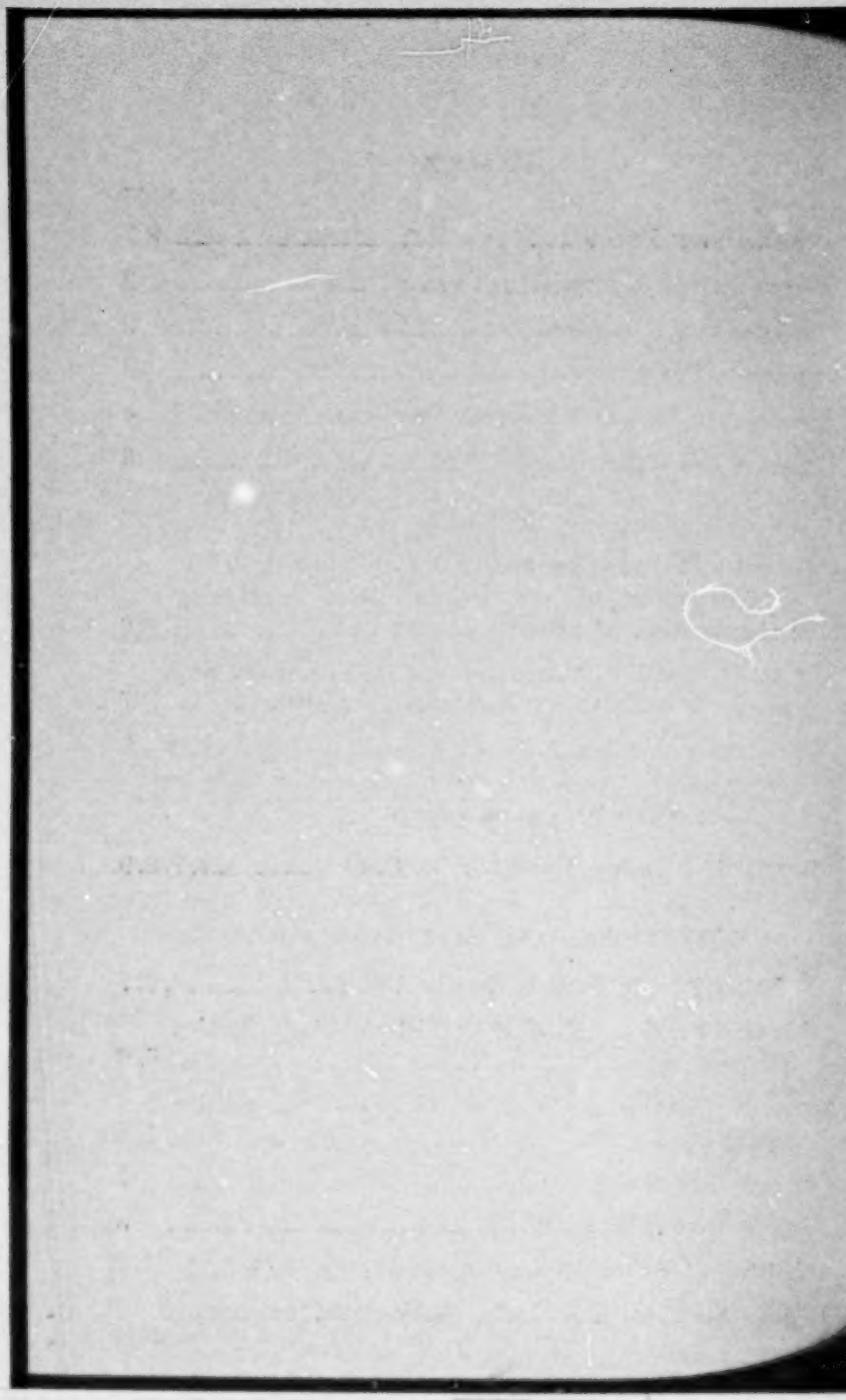

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

IN RE PETITION OF MARTIN LUDWIG COHNSTAEDT FOR NATURALIZATION,

Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Martin Ludwig Cohnstaedt, respectfully prays that a Writ of Certiorari be issued to the Supreme Court of the State of Kansas to review a judgment of that Court denying Petitioner's application for citizenship.

The Opinion Below

The opinion of the Supreme Court of Kansas has not yet been officially reported. It is unofficially reported in 207 P. 2d 425.

Statement of Matters Involved

Petitioner filed a petition for naturalization pursuant to the Nationality Act of 1940 in the District Court of Barton County, Kansas, seeking a decree of naturalization, on May 13, 1947 (A.* 1-3). His petition was opposed by the Immigration and Naturalization Service of the United States Department of Justice upon the ground that the Petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (A. 3).

After a hearing (A. 8-32) the Trial Court first granted the petition (A. 4, 5), but after reconsideration denied it without giving any reasons (A. 5). That decision was affirmed by the Kansas Supreme Court, the highest court of that state.

As appears from the hearing, the objection to the naturalization of Petitioner rested entirely upon his pacifist views, Petitioner being a Quaker (A. 16). Petitioner was born in Germany in 1917 (A. 9), left Germany in 1934 for England and came to this country from England in 1937 (A. 9). In this country he worked primarily as a farmer (A. 10), and has obtained a degree of B.S. in Agriculture from Rutgers University (A. 11). In 1946 he worked in Poland under the auspices of UNRRA and since then has taught at Sterling College, Kansas (A. 12). He is married to an American citizen (A. 12, 13), has subscribed to the principles enunciated in the Constitution of the United States and has announced his willingness to renounce his allegiance to the German State (A. 13).

On cross-examination it appeared that Petitioner had expressed the opinion that in a Christian nation the armed services were not necessary (A. 15).

Asked whether he would be willing to contribute "in any way to armed forces" he said: "I do not believe in this country engaging in armed conflict for any reason

* The reference A. is to the abstract used in the state court, which begins at page 6 of the certified transcript.

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and I cannot contribute anything to be used solely and directly in furtherance of armed conflict" (A. 17). He was asked whether he would be willing to work in munitions factories in time of war and said no (A. 17). This answer appeared to have been the chief reason for the position of the Kansas Supreme Court.

However, Petitioner stated that he would be willing to help remove wounded from the battlefield but not willing to deliver munitions to men at the front (A. 18). While he objected to becoming a member of the Armed Forces he said he would not object to wearing a uniform if that were possible without becoming such member (A. 19). It appeared that in World War II he was recognized by the draft authorities as a conscientious objector and given a 4E classification (A. 20).

Petitioner's application for citizenship was supported by the President Emeritus of Sterling College (A. 23) and by a Minister of the Congregation Church of Partridge, Kansas (A. 26).

Statement on Jurisdiction

The judgment of the Supreme Court of the State of Kansas was entered on June 11, 1949. Timely application under Kansas law was made for a rehearing. This application was denied without opinion by the Kansas Supreme Court on July 8, 1949.

The jurisdiction of this Court is invoked under Section 1257(3) of the United States Judicial Code.

Question Presented

Was this Petitioner properly denied the right to be naturalized as a United States citizen by the state courts of Kansas because of his conscientious scruples against war and its associated activities even though he conformed to the legal standards of conduct that have been to date demanded of United States citizens?

Constitutional and Statutory Provisions Involved

United States Constitution—Article 1, Section 8.

"The Congress shall have power * * * to establish an uniform rule of naturalization * * *."

Nationality Code, Title 8.

"§ 735. Oath of renunciation and allegiance.

(a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of the naturalization of a child under the provisions of sections 715 or 716 the naturalization court may waive the taking of such oath if in the opinion of the court the child is too young to understand its meaning.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgement whereof I have hereunto affixed my signature."

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Selective Service Act of 1940,
Title 50, App. § 305.

"(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

Selective Service Act of 1948,
Title 50, App. § 456.

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred."

Reasons for Allowance of Writ

The writ should be granted because the Kansas Court misapplied the Nationality Act of 1940 and misinterpreted the decision of this Court in *Girouard* v. *United States*, 328 U. S. 61, in denying Petitioner the federal right of citizenship to which he was entitled under the statute as interpreted.

The views of Petitioner are substantially the same as those of Rosika Schwimmer, whose application for naturalization was rejected by this Court in 279 U. S. 644, one of the decisions overruled by the later decision in the *Girouard* case.

There is no basis for the distinction made by the Supreme Court of Kansas that Petitioner was not entitled to citizenship because he refused to serve in the Army as a non-combatant. The Selective Service Act of 1940 [50 U. S. C. App. § 305(g)] recognized that a conscientious objector was entitled to exemption from *non-combatant* as well as from combatant service and in such case would be required to perform work of national importance. Pursuant to that provision Petitioner was actually exempted from all military obligations (A. 20). The same principle was carried forward into the Selective Service Act of 1948 [50 U. S. C. App. § 456(j)] except that under that law a person who claimed exemption from non-combatant service was deferred entirely.

ARGUMENT

POINT I

The question involved is important in the administration of the federal laws concerning naturalization of aliens.

The Nationality Act of 1940 and as amended does not specifically exclude from naturalization conscientious ob-

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jectors to war who are non-combatants. (See U. S. Code, Title 8, Secs. 601 et seq.). Rather the Nationality Act of 1940, supra, and as amended provides in substance that any alien who can take the oath of allegiance in good faith is entitled to a decree of citizenship, but the Kansas court, as disclosed by the opinion in this case, has flatly ruled that the Petitioner, a member of the Society of Friends, opposed by reason of his religious scruples from participating as a non-combatant in the Armed Forces, is not attached to the principles of the Constitution and that the *Girouard* case, 328 U. S. 61, so held. Petitioner asserts that this is a patent error made by the trial court and the Kansas Supreme Court in this case and that it is contrary to the views expressed by this Court in the *Girouard* opinion, namely, that a pacifist in the broad sense of the term, is not by reason of that alone disqualified from seeking his naturalization as a United States citizen.

POINT II

Petitioner sustained his burden of proving that he is entitled to a decree of naturalization.

The record discloses that this Petitioner was a person of German birth who filed his petition to become a naturalized citizen in the District Court of Barton County, Kansas. He offered evidence in support of his petition which disclosed briefly that he was born in 1917, came to the United States in 1937, and attended school in the United States and since 1946 had been a teacher at Sterling College, in Sterling, Kansas. Petitioner states that he subscribed to the principles enumerated in the Constitution of the United States, and that he agreed to support and defend the Constitution and laws against all enemies and to bear true faith and allegiance to the United States, and that he made such statements without mental reservations. On cross-examination, Petitioner stated that he believed the exist-

ence of armed services was not necessary in a Christian nation, and that he was willing to have repealed all laws providing for armed services; that he was not an ordained minister, but was a member of the Society of Friends; that he was willing to perform any duty which the Government required which did not conflict with his religious beliefs, but that he could not contribute anything to be used solely and directly in furtherance of armed conflict; that he was opposed to sending arms and ammunition to our allies in the recent war; that he was not willing to work in a munitions factory in time of war and assist in manufacture of munitions for the purpose of destroying enemy forces whose aim would be to destroy the armed forces of the United States; that in event of war, if it should be permissible for civilians to remove the wounded from a battleground he would do so, but he would not deliver ammunition to men at the front who were engaged in combat duty.

From this the Kansas Supreme Court concluded that Petitioner was not willing to serve in the armed forces as a non-combatant and that therefore he was not entitled to be a United States citizen under the doctrine handed down in *Girouard* v. *United States*, supra.

The decision of this Court in the *Girouard* case does not justify the distinction made by the Kansas Court, although it is true that Girouard expressed a willingness to serve in the Army as a non-combatant. Mr. Justice Douglas pointed out that the oath required by Congress [8 U. S. C. § 735(b)] bound both non-combatants and combatants and that eligibility for citizenship should therefore in no way depend on whether a person was willing to act as a combatant or a non-combatant.

Congress has further recognized this by the provisions of the various Selective Service Acts. In 1940 the law provided that a person who was conscientiously opposed to war on religious grounds, as is the case of Petitioner here, was not only entitled to exemption from combatant service and entitled to serve as a non-combatant, but, furthermore, that if his conscientious scruples prohibited him

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from serving even as a non-combatant he would be nevertheless entitled to exemption and that in that event would be required to serve at work of national importance. In the 1948 Act the essential provisions are retained except that a person whose conscience prohibits him from serving even as a non-combatant is totally deferred.

It is plain, therefore, that Congress recognized that the call of conscience would justify a person refusing to serve even as a non-combatant. Since the Draft Law gives exemption in such case, it is difficult to see how it can be argued that a person who refuses to serve as a non-combatant can be denied citizenship. The decision of the Court below is therefore contrary to the Nationality Act as interpreted by this Court. The issue raised is important and calls for review by this Court.

CONCLUSION

It is therefore respectfully submitted that this Court grant a writ of certiorari in order to decide whether or not the Kansas Supreme Court correctly applied the doctrine of the *Girouard* case to the instant case, and that Petitioner's rights granted by the Congress of the United States in the Nationality Act of 1940 and as amended be adequately protected.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Petitioner,
120 Broadway,
New York 5, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITIONER'S REPLY BRIEF

The Government makes two points: that this Court did not intend in the *Girouard* case to extend the right of citizenship to persons who would not serve as non-combatants, and that Congress has indicated the same intent by certain additions to the law in 1942. As to the first point, this Court alone can determine what its intention was. To what we said before we can add only that we do not quite understand the basis for the Government's statement (p. 11) that this Court did not overrule the *Macintosh* and *Schwimmer* cases. We had thought the contrary was clear.

As to the 1942 provisions referred to (p. 12), these were, of course, before this Court when it decided the *Girouard* case and one of them was in fact referred to by Chief Justice Stone in his dissent (328 U. S. at 77). It seems to us that these amendments support petitioner's view rather

than that of the Government. The amendments are parts of provisions granting special privileges to persons who served in the armed services. The provisos make it clear that conscientious objectors who performed no military service and wore no uniform should not be considered eligible for these special privileges. The inference is that but for the provisos such persons might have been considered eligible for the special privileges. If persons like petitioner were automatically barred from citizenship because of the form of the oath or their supposed lack of attachment to the principles of our Government, it would certainly not have been necessary for Congress expressly to exclude them from the special privileges granted to veterans, since veterans are required to take the oath and to show their attachment to our Government.

It is significant, moreover, that while Congress thought it necessary to exclude certain groups from those special privileges, it did not consider it appropriate to exclude them from all right to become citizens. Such right must, therefore, be deemed to exist.

It is respectfully submitted that the question presented is of importance and should be fully considered by this Court.

Osmond K. Fraenkel,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

In re Petition of MARTIN LUDWIG COHNSTAEDT
for Naturalization,

Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR PETITIONER

The Opinion Below

The opinion of the Supreme Court of Kansas is officially reported in 167 Kan. 451.

Statement on Jurisdiction

Certiorari was granted by this Court on December 5, 1949, to review a judgment of the Supreme Court of the State of Kansas. The jurisdiction of this Court is invoked under Section 1257(3) of the United States Judicial Code.

Statement of the Case

Petitioner's application for naturalization pursuant to the Nationality Act of 1940 was opposed in the District Court of Barton County, Kansas by the Immigration and Naturalization Service of the United States Department of Justice upon the ground that petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (5).

After a hearing the Trial Court first granted the petition (6), but after reconsideration denied it without giving any reason for such denial (7). That second decision was affirmed by the Kansas Supreme Court, the highest court of that state (29).

The objection to the naturalization of petitioner rested entirely upon his pacifist views. Petitioner, who is a Quaker (14), was born in Germany in 1917 (9). He left Germany in 1934 for England and came to this country from England in 1937 (10). In this country he has worked primarily as a farmer and has obtained a degree of B.S. in Agriculture from Rutgers University (10). In 1946, he worked in Poland under the auspices of UNRRA and since then has taught at Sterling College, Kansas (11). He is married to an American citizen (12). Petitioner has subscribed to the principles enunciated in the Constitution of the United States and has announced his willingness to renounce his allegiance to the German State (12).

In World War II petitioner had been recognized by the draft authorities as a conscientious objector and given a 4E classification (17).

Petitioner expressed the opinion that in a Christian nation the armed services were not necessary (13). He said: "I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed con-

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flict" (15). He was asked whether he would be willing to work in munitions factories in time of war and said no (15).

However, petitioner stated that he would be willing to help remove wounded from the battlefield, but would not be willing to deliver munitions to men at the front (15). While he objected to becoming a member of the Armed Forces, he said he would not object to wearing a uniform if that were possible without his becoming such member (16).

Petitioner said: "I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs" (14).

Petitioner's application for citizenship was supported by the President Emeritus of Sterling College (19), and by a minister of the Congregation Christian Church of Partridge, Kansas (21).

The Supreme Court of Kansas upheld the denial of petitioner's application solely because he was "not willing to serve in the army as a non-combatant" (32).

The Question Presented

Was petitioner properly denied the right to be naturalized as a United States citizen by the state courts of Kansas because of his conscientious scruples against war and its associated activities even though he conformed to the legal standards of conduct that have been to date demanded of United States citizens?

Specification of Error

The Kansas Supreme Court erred in denying petitioner's application for citizenship.

ARGUMENT

POINT I

A willingness to perform non-combatant services is not a requisite for citizenship.

The Kansas Supreme Court denied petitioner's application for citizenship only because it found that he was unwilling to serve in the army as a non-combatant. The state court pointed to no provision of law or decision of this Court which required such a conclusion. It appeared, however, to believe that this Court intended to reach such result by its decision in *Girouard* v. *United States*, 328 U. S. 61, because it noted that in that case the applicant for citizenship had been willing to serve in the army as a non-combatant. While that was the fact, we submit it was not a controlling element in the decision. Nor has it been so considered in the federal courts.*

There is nothing either in the opinion of this Court in the *Girouard* case or in the relevant statutes which justifies the position taken by the Kansas court. On the contrary, a proper interpretation of the statutes compels a holding that no distinction can properly be made between combatant and non-combatant conscientious objectors in connection with an application for citizenship in which the applicant is not seeking the benefit of any special consideration.

There are three groups of statutes which should be considered in this connection, the relevant parts of which are given in the appendix: the general provisions which regulate naturalization and which prescribe the oath of renunciation and allegiance (8 U. S. C. 707(a) and 735); the

* In *Application of Wiebe*, 82 F. Supp. 130, Judge Delehant admitted a Mennonite applicant who refused to perform non-combatant military service. Cf. *Application of Boulding*, where, in the District Court for the Southern District of Iowa (Central Division, Case No. 4388) on the authority of the *Girouard* case, Judge Dewey admitted a Quaker who, like petitioner, was unwilling to perform non-combatant service (Tr. 45).

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special provisions permitting certain alien veterans to become citizens without compliance with all of the requirements imposed on aliens generally (8 U. S. C. 723a, 1001, 1004), and the provisions of the draft laws which deal with conscientious objectors (50 U. S. C. App. 305(g), 456(j)).

The general statutes (quoted at pp. 9, 10) contain nothing which suggests any distinction between aliens willing to serve in the armed forces, whether as combatants or as non-combatants, and those wholly unwilling to serve in the armed forces. That was in effect recognized by this Court in the *Girouard* case. There Mr. Justice Douglas, after quoting the required oath in full, noted that this oath made no such distinction (328 U. S. at 67, 68). The logic which there led this Court to reject the view formerly held by it that an alien must be willing to bear arms to become a citizen requires also a rejection of the state court's view in the instant case that an alien applicant for citizenship must be willing to serve in the armed forces. That this Court intended so to rule seems clear from its repudiation of the *Schwimmer* and *Macintosh* cases (279 U. S. 744 and 283 U. S. 605) and its reliance (328 U. S. at 64-68) on the dissents of Mr. Justice Holmes and Mr. Chief Justice Hughes in those cases.

In the *Schwimmer* case (as Mr. Chief Justice Stone noted in his dissent in 328 U. S. at 72, note 1) the applicant for citizenship was, like petitioner here, unwilling to perform any military service whether combatant or non-combatant. In the *Macintosh* case (see 283 U. S. at 618), the applicant went further than this petitioner has gone, for he reserved the right to judge for himself whether a particular war was a just one. On the other hand, the situation of petitioner is very like that of the applicant in *United States* v. *Bland*, 283 U. S. 636, who was willing to do whatever was required of her, but only "as far as my conscience as a Christian will allow" (Cf. petitioner's statement quoted above, that he will do what is required, if not in conflict with his Christian beliefs).

We cannot but believe that in overruling all these cases this Court accepted, although it did not quote, these words of Mr. Chief Justice Hughes:

> "• • • There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence" (283 U. S. at 634).

To interpret the oath as imposing an obligation to give non-combatant services, as the state court has done here, is as much a misinterpretation as the now repudiated concept that it imposes an obligation to fight.

We submit, moreover, that the second group of laws we have above referred to indicates that Congress did not intend the naturalization oath to have the meaning imputed to it by the state court here. In 1942 Congress enacted two provisions to expedite the naturalization of alien veterans (8 U. S. C. 723a, 1001, 1004, quoted at pp. 10-12), both of which exempt such veterans from certain of the requirements imposed on all aliens. But neither provision modifies those parts of the general law which require an applicant to be attached to the principles of the Constitution and to take oath to support and defend the Constitution and laws. Yet Congress explicitly excluded from the benefit of these expediting provisions any "conscientious objector who performed no military duty whatever or refused to wear the uniform".

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It is clear, of course, that had petitioner claimed the benefit of these expediting provisions he would have been barred. But he has not claimed any such benefit and has proceeded on the basis of the general law. Thus he showed that he lawfully entered the United States, that he resided there for at least ten years (4), and that he was able to speak the English language (5)—none of which showing would have been necessary had he applied under the special section (Cf. 8 U. S. C. 1001, and 8 U. S. C. 704, 732). But the fact that Congress has deprived a certain group of aliens of the right to these expediting provisions cannot be used to justify an inference that Congress intended to bar the same group from citizenship under the general law. Had Congress intended to do that it would have made the provisos a part of the general law, not part of the special expediting provisions. The very fact that these provisos were inserted in the expediting provisions indicates that except for such provisos the excluded category of aliens would have been eligible even for the special privileges.

Certainly if the contention of the state court were correct that a person like petitioner is automatically barred from citizenship because of his supposed lack of attachment to the Government, or inability to take the oath without reservations, it would not have been necessary for Congress expressly to have excluded such a person from the special privileges. It must be borne in mind that a person claiming those privileges must take the same oath and show the same attachment to the Constitution as anyone else. Since Congress saw fit to exclude aliens of a certain category from the special privileges but not from all right to become citizens, no court can hold a person coming within that category to be disqualified from citizenship when he claims no special privilege.

Finally, we call attention to the fact that Congress, in the various Selective Service laws (50 U. S. C. App. 305(g), 456(j), quoted at pp. 12, 13), has consistently recognized the right of conscientious objectors to refuse even non-

combatant service. The 1940 and 1948 Acts both provided for exemption from non-combatant service of draftees who had conscientious religious scruples against such service. Under the earlier law, a person given the exempt status was required to perform work of national importance under civilian supervision—petitioner indeed came within this category in 1941 (17). Under the current law a person exempted because of unwillingness to perform even non-combatant service is totally deferred. It is plain, therefore, that Congress has consistently recognized that the call of conscience justifies a person in refusing to serve even as a non-combatant.

Never in our history has Congress compelled a religious conscientious objector such as petitioner to enter the armed services. It is difficult to see, therefore, how it can be argued that a person who complies with the law as enacted by Congress can be characterized as lacking attachment to the Constitution and laws of the United States.

CONCLUSION

Absent the disqualification improperly imposed by the state court there can be no question but that petitioner is qualified to become a citizen. He is a member of the Society of Friends (14) whose value as citizens has been attested by members of this Court. As Justice Holmes said in his dissent in the *Schwimmer* case, 279 U. S. at 655:

> "• • • And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

Cf. Mr. Justice Black dissenting in *In re Summers*, 325 U. S. at 575.

We submit, therefore, that the decision of the Kansas Supreme Court is contrary to the Nationality Act and at variance with the intent of Congress and the views of this Court. The judgment under review should be reversed and petitioner admitted to citizenship.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Petitioner.

APPENDIX

Nationality Code, Title 8

§ 707. Eligibility for Naturalization; Residence. (a) No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

§ 735. Oath of renunciation and allegiance.

(a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of the naturalization of a child under the provisions of Sections 715 or 716 the Naturalization Court may waive the taking of such oath if in the opinion of the Court the child is too young to understand its meaning.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgement whereof I have hereunto affixed my signature.

§ 723a. Naturalization of persons serving in the armed forces of the United States during World War I and earlier wars.

A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June, 1916, to April, 1917, who is not an alien ineligible to citizenship, who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform, and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the

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time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after December 7, 1942, to naturalization upon compliance with all of the requirements of the naturalization laws, except that——

(1) no declaration of intention shall be required;

(2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and

(3) no residence within the jurisdiction of the Court shall be required.

* * * * * *

§ 1001. Exception from certain requirements.

Notwithstanding the provisions of Sections 703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during World War II and who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet

any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: • • •

§ 1004. Persons excepted from subchapter; revocation of citizenship upon dishonorable discharge.

The provisions of this subchapter shall not apply to (1) any person who during World War II is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: *Provided*, That citizenship granted pursuant to this subchapter may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 738 of this title; and such ground for revocation shall be in addition to any other provided by law.

Selective Service Act of 1940,
Title 50, App.

§ 305(g). Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. • • •

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Selective Service Act of 1948,
Title 50, App.

§ 456(j). Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred. * * *

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

PETITIONER'S REPLY BRIEF

1. Before discussing the points made by the Government we desire to make a few additions to our original brief. In the first place, to the cases listed in the footnote on page 4 should be added that of Emily Shacklock, who was admitted to citizenship by Judge Fake in Newark, New Jersey, on January 19, 1950. We are informed that the Immigration and Naturalization Service did not oppose her application although, like petitioner, she refused to agree to serve in the armed forces as a non-combatant. We also think that among the statutes relevant to the intent of Congress the Court should consider 50 U. S. C. App. 454(a). This is the section which defines the persons to

whom the Selective Service Act shall apply. The part here relevant states:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

The significance of this provision is that an alien is declared disqualified from applying for citizenship *only after* he has sought all the deferments and exemptions under the law, one of which is deferment by reason of being a conscientious objector, opposed, as is petitioner, even to non-combatant service (see 50 U. S. C. App. 456(j), quoted at p. 15 of our original brief). Congress has thus indicated that a person is not disqualified from citizenship merely because he is a non-combatant conscientious objector but only if his contention that he is such is rejected and he then seeks to become exempted from the draft because he is an alien.

Finally we want to call attention to the provisions of the Nationality Act by which Congress has expressly excluded from citizenship persons falling within certain categories: 8 U. S. C. 703(a), which limits citizenship to persons of certain races and which in 1940 was even more restrictive than it is now; 8 U. S. C. 705, which excludes anarchists or advocates of the overthrow of the Government by force, advocates of assassination of officials, advocates of unlawful damage to property and advocates of sabotage, and also persons who are members of or affiliated with any organizations advocating such doctrines; 8 U. S. C. 706, which excludes draft evaders and deserters from the armed forces.

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Thus, when Congress wanted to exclude certain categories of aliens from the right to become citizens it knew how to do so in clear and unmistakable terms. Conscientious objectors, whether willing to serve in the military forces or not, have never been so specified.

2. There is no need to deal with the first point in the Government's brief (pp. 15-26) which discusses the Constitution. Petitioner is here claiming no constitutional privilege. He is asking only that a broad statute be not so construed as to penalize him for sincere adherence to his religious scruples. If Congress wants to exercise its constitutional power to accomplish this result, let Congress say so.

We cannot, however, let the discussion in the Government's brief (pp. 24-26, 38, 48, 67) of *In re Summers*, 325 U. S. 561, pass unnoticed. That case is here inapplicable for two reasons. In the first place its reasoning was based largely on the earlier decisions of this Court which we believe no longer represent its considered judgment. In the second place the Court was there concerned with the validity of state action challenged under the due process clause of the Fourth Amendment, not with the meaning of ambiguous, broad language in a Congressional enactment.

3. The Government in the first part of its second point begs the question. It assumes (p. 26) that petitioner is unwilling to assist the United States during time of war or emergency in any way whatever. Such are not the facts. In his preliminary examination petitioner said that he would do anything which was "beneficial in time of peace as in time of war" (R. 25). He has not objected to assisting in the war effort, but only to doing work which had no other function than destruction and killing. In fact he performed useful services in the vital field of agriculture (R. 25). In the light of these facts the discus-

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sion in the Government's brief and the authorities cited (pp. 27-33) are not pertinent and call for no specific comment.

4. It is, of course, true, as stated by the Government (pp. 34-37), that the Immigration and Naturalization Service has since 1923 assumed that it was proper to ask applicants for citizenship whether they were willing to bear arms and that this Court, twenty years ago, accepted the contention of the Service that a negative answer to such a question disqualified an application. We submit such is no longer the law.

We challenge the interpretation placed by the Government (pp. 38-45) on this Court's decision in the *Girouard* case. Since that case in fact dealt with a conscientious objector willing to perform non-combatant service, it was not inappropriate for the Court, in its opinion, to have stressed the value of such service in time of war. We believe, however, that this Court did not intend to limit itself to the precise situation which there existed. We believe, moreover, that the Court intended to overrule its earlier decisions, not merely to disagree with the "rule" laid down in those cases, as suggested by the Government (p. 41). For Mr. Justice Douglas, at 328 U. S. 63, said that while there were certain factual distinctions between the *Girouard* and the earlier cases "the principle emerging from the three cases obliterates any factual distinction among them".

The fear expressed by the Government (pp. 41, 42) that a reversal here would open the doors of citizenship to persons who might oppose our military enterprises, consort with a potential enemy, or affirmatively pursue a course of action opposed to the national interest, is without the slightest foundation. There is no possibility that a Court would find that such persons were attached to our Government. On the other hand, a person who, like petitioner, is willing to remove wounded from the battlefield and to assist in the vital area of food production, and whose sincerity is not questioned, should be eligible for citizenship.

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5. We come next to the Government's discussion (pp. 45-47) of the legislative history. Whatever may have been the reason for specifying non-combatant conscientious objectors as barred from the benefits of the special privileges available to veterans, it is perfectly clear that there would have been no necessity for doing so had Congress believed that they were barred by the general statute. While the various reports dealing with the special legislation (some of which are referred to in notes 27 and 31 of the Government's brief, pp. 45, 46) make no mention whatever of the subject of conscientious objectors, two of them contain language which may be relevant to the problem presented in this case.

Both House Report 1710 of the 77th Congress, 2nd Session [concerning HR 6439 which became 8 U. S. C. 1004] and Senate Report 1664 of the same Session [concerning HR 4167 which became 8 U. S. C. 723(a)] stressed the fact that the requirement of attachment to the Constitution and disposition to the "good order and happiness" of this country must still be proved by applicants. Evidently the framers of these Reports did not think that a person opposed to non-combatant military service was barred under the general requirements or else they would not have added the specific exclusion of this category from the legislation providing special benefits.

6. The last part of the second point in the Government's brief (pp. 47-57) is an attempt to reargue the question of statutory construction involved in the *Girouard* case and obtain the Court's present adherence to the views there expressed by the minority. In substance the argument is that since Congress refused to modify the law to change the result of the earlier cases, it must be deemed to have accepted them. Equally is it true that Congress has refused to amend the law after the repudiation of those earlier cases in the *Girouard* case [see legislation referred to in the Government's brief (p. 56)]. The Government suggests (p. 57) that this later inaction can be explained

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by the circumstance that general revision of the law is under consideration. But Congress has not hesitated to amend the sections dealing with naturalization in a considerable number of respects since the *Girouard* case was decided (see 8 U. S. C. § 703, amended July 2, 1946; § 721a, added July 2, 1946; § 723, amended August 7, 1946; § 724, amended July 2, 1946; § 724a, added June 1, 1948; § 727, amended May 16, 1947; § 731, amended May 31, 1947; § 732, amended May 31, 1947, and June 25, 1948; § 732a, added May 31, 1947; §§ 734 and 735, amended May 31, 1947; § 739, amended July 23, 1947).

While the Government (brief, p. 57) refers to the administrative interpretation that the effect of the *Girouard* case was limited to persons willing to serve as non-combatants, the federal judiciary, as already noted, reached a quite different conclusion. Particularly persuasive is the reasoning of Judge Delehant in *Matter of Wiebe*, 82 F. Supp. 130.

7. Finally, the Government argues (pp. 58-70) that petitioner has not brought himself within the law. This argument rests on the same fallacy we have already discussed concerning the nature of petitioner's views. There is no basis for the contention made by the Government (p. 60) that petitioner claims special naturalization status. On the contrary, he claims only that Congress has not deprived him of rights available to all because of any special views he may have had. Nor does he claim full equality with native-born Americans, as the Government suggests (pp. 64-65). He asks only that a general statute should not be so interpreted as to penalize aliens for views held by thousands of honorable native-born citizens.

While it is, of course, true, as the Government suggests (p. 69), that mere denial of citizenship does not deprive an alien of his freedom of expression or religion, it is perfectly evident that if this Court were to hold that aliens holding certain lawful opinions were ineligible to become

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citizens, the freedom of aliens to hold those opinions would be gravely restricted. Whenever the rights of any persons are limited because of their opinions, to that extent their freedom is curtailed even though those persons could not be punished for the direct expression of the views. In any case, a construction of the statute should be avoided which might in any degree restrict any of our great freedoms. If reasons of policy indicate a necessity for restricting the rights of aliens in such regard, the responsibility for such decision should be that of the Congress, not of this Court. Consequently the judgment appealed from should be reversed.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kansas Supreme Court (R. 28-32) has not yet been officially reported. It is unofficially reported at 207 P. 2d 425.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered June 11, 1949 (R. 28-32), and a motion for rehearing filed July 1, 1949 (R. 32-36), was denied July 8, 1949 (R. 36). The petition for a writ of certiorari was filed October 6,

1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See also 28 U.S.C. 2101(c).

QUESTION PRESENTED

Whether an alien who is unwilling because of religious scruples to contribute "anything to be used solely and directly in furtherance of armed conflict" or to wear the uniform of the armed forces in any capacity may be admitted to citizenship.

STATUTE INVOLVED

The pertinent provisions of the Nationality Act of 1940, 54 Stat. 1137, are as follows:

> Sec. 307. (a) (8 U.S.C. 707(a)). No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.
>
> Sec. 335 (8 U.S.C. 735)(a). A person who has petitioned for naturalization shall, before

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being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, * * *.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature.

STATEMENT

Petitioner, a teacher at Sterling College, Sterling, Kansas, was born in Germany in 1917, entered the United States in 1937, and has since resided in this country (R. 4-5, 9-11, 12). He married an

American citizen in 1943 and at the time of the hearing in November 1947 (R. 6) they had two children (R. 11, 12, 17). He was classified IV-E as a conscientious objector under the Selective Service Act of 1940 and, with his draft board's approval, engaged in agricultural activities, including teaching (R. 10-11, 17, 25). In May 1947, he filed a petition for naturalization in the District Court of Barton County, Kansas (R. 4-5). On examination before a naturalization examiner in October 1947, petitioner made the following verified statement (R. 23-25; see also R. 13-17):

> Q. On April 9, 1947, at Hutchinson, Kansas, you testified before me and you stated that you believed the existence of Armed Service is not necessary in a Christian nation. Is that correct?
>
> A. Yes.
>
> Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?
>
> A. Yes.
>
> Q. Are you an ordained minister?
>
> A. No. I am a member of the Society of Friends which has no ordained ministers.
>
> Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: "Any relief of suffering or any effort of a constructive nature which did not require entering the

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Armed Forces." Will you explain in more detail what you mean by that answer?

A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs.

Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever?

A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict.

Q. In time of war would you be willing to render any and all services for which you may be physically able to render in furtherance of the war effort of the United States which would not necessitate the wearing of the uniform of one of the armed forces and which would not necessitate the bearing of arms?

A. Only as qualified in my answer to the question next above.

Q. Did it meet with your approval for the United States to send arms and ammunitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?

A. It did not. I was opposed to that.

Q. Are you glad Germany was defeated in the recent war?

A. I was opposed to Nazism in Germany from its inception and I would be pleased if Germany were freed from it but I do not be-

lieve it has been nor has it been benefited directly in any way by the war. I also believe the United States has lowered its resistance to Nazi influence because of having expended its energies in an attempt to resist Nazism by armed force.

Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?

A. No.

Q. What, if anything, did you do or try to do in furthering the war effort of the United States during the recent war?

A. Whatever I did would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort. My work was teaching agriculture, testing butter fat and working in UNRRA which work was at all times of national importance and acceptable to my draft board.

Q. In the event it should be permissible in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?

A. Yes.

Q. In the event it should be permissible in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?

A. No.

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Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?

A. No.

Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?

A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces.

Q. If you were a minister could you wear the uniform as a chaplain?

A. No. Because chaplains are members of the armed services.

On the basis of these statements, the examiner found that petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (R. 5). On petitioner's demand, a hearing was held before the court in November 1947 (R. 6), at which petitioner and his witnesses testified, the examiner filed a recommendation that the petition be denied, and petitioner's statement quoted above was acknowledged by him and introduced in evidence (R. 9-25).

In February 1948, the court entered a decision finding "that under the authority of *Girouard* v.

United States, 328 U. S. 61, * * * said Petitioner should be admitted to citizenship of the United States * * *" (R. 6). Later, in June 1948, after petitioner had filed a motion for judgment in accordance with the court's findings and conclusions, the court entered an order denying the petition for naturalization. A motion for a new trial was argued and denied on August 18, 1948. (R. 7.) On appeal to the Kansas Supreme Court, the judgment was affirmed (R. 28-32).

ARGUMENT

In *Girouard* v. *United States,* 328 U. S. 61, upon which petitioner relies, this Court reexamined the rule of the earlier *Schwimmer* (279 U. S. 644), *Macintosh* (283 U. S. 605), and *Bland* (283 U. S. 636) cases "that an alien who refuses to bear arms will not be admitted to citizenship" (328 U. S. at 63), and concluded that those cases "do not state the correct rule of law" (*id.,* at 69). However, the Court was there concerned with an applicant for citizenship who was conscientiously opposed on religious grounds to bearing arms, but who was willing, if called for service under the Selective Training and Service Act of 1940, to perform non-combatant service in the armed forces. And the Court held, as a matter of statutory construction (see *id.,* at 63), that such a person is qualified to take the naturalization oath (*supra,* p. 3). The Court found support for this holding in the dissenting views expressed in the *Schwimmer* and *Macintosh*

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cases, in the provisions of the Selective Training and Service Act of 1940 and earlier draft laws for the induction of religious objectors for non-combatant service (328 U. S. at 66-67), and in the relaxed requirements for naturalization enacted in 1942 for the benefit of aliens who served in our armed forces in World War II, whether as combatants or non-combatants (*id.*, at 67-68). It is thus clear from the *Girouard* decision that a refusal on religious grounds *to bear arms* in defense of the country does not of itself disqualify an alien seeking citizenship. But it does not follow from this abrogation of the requirement of willingness to bear arms that aliens who, like petitioner here, are unwilling to perform *any* service in furtherance of a war effort of the United States are qualified to take the naturalization oath. The court below construed the *Girouard* case as holding that "an alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant, but who because of religious scruples is unwilling to bear arms in defense of this country, may be admitted to citizenship" (R. 31), but it declined to extend the rule of that case to one like petitioner who is "not willing to serve in the army as a non-combatant" (R. 32).

We agree that petitioner has failed to meet the minimum requirements for citizenship as interpreted in the *Girouard* case. In upholding Girouard's claim that he was qualified to take the naturalization oath despite his unwillingness to participate in the war effort as a combatant, the

Court observed that, in modern total war, essential contributions to the war effort are made by those whose religious scruples prevent them from bearing arms. It said (328 U. S. at 64):

> The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. * * *. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. * * * One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among noncombatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory.

But unlike Girouard and others such as those mentioned in the quotation, petitioner is not willing to work in a munitions factory in time of war, deliver ammunition to men at the front, or "contribute anything to be used solely and directly in furtherance of armed conflict", either in a combatant or a non-combatant capacity. We submit, therefore, that he is not willing to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic," as the statutory oath requires.

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Petitioner argues, however, that in the *Girouard* case the Court did not distinguish between persons willing to serve in the armed forces as non-combatants and those who are unwilling to contribute to a war effort in any capacity. But the facts of that case and the tenor of the majority opinion negate this contention. The Court held only that the naturalization oath does not exact a willingness to bear arms and to that extent it disapproved the earlier decisions. While, undoubtedly, the effect of the decision was to overrule the decision in the *Bland* case, which the Court thought was "indistinguishable" (328 U. S. at 63),[1] it is significant that the Court did not overrule the decisions in the *Macintosh* and *Schwimmer* cases, which were distinguishable on their facts (*ibid.*), but only reversed the *rule* of those cases and *Bland* that willingness to bear arms is a prerequisite to naturalization (*id.*, at 63-64, 69).

The fact that in the Selective Service Acts of 1940 and 1948, Congress made specific exemptions from combatant and non-combatant service for those unwilling to serve in either capacity because of religious scruples does not, as petitioner asserts (Pet. 8-9), manifest a congressional intent as to the proper interpretation of the naturalization oath. It merely indicates a desire by Congress to accom-

[1] Bland, like Girouard, was opposed only to bearing arms. She had spent nine months in the service of the United States in France nursing our soldiers and was willing to defend the country "as far as my conscience as a Christian will allow" (283 U. S. 636, 637).

modate the military needs of the nation and the religious scruples of those who are conscientiously opposed to war.

The best evidence of Congress' intent as to the eligibility of a conscientious objector to combatant and non-combatant service to take the naturalization oath is found in the Act of May 26, 1926, c. 398, §§ 1, 7, 44 Stat. 654, which made provision for the more expeditious naturalization of alien veterans of World War I, and the acts of March 27, 1942, c. 199, § 1001, 56 Stat. 176, 182 (8 U.S.C. 1001, 1004), and December 7, 1942, c. 690, 56 Stat. 1041 (8 U.S.C. 723a), both of which were additions to the Nationality Act of 1940 and grant special privileges in respect of naturalization to alien veterans of both world wars, the Spanish-American War, and the Mexican Border campaign. All of these statutes contain an identical proviso excluding from their benefits any "conscientious objector who performed no military duty whatever or refused to wear the uniform." As we have pointed out, the Court in the *Girouard* case found support for its construction of the naturalization oath prescribed by the Nationality Act as not requiring a willingness to bear arms in the fact that, without making any change in the oath, Congress extended the benefits of the 1942 statutes to alien veterans who, because of religious scruples, were unwilling to bear arms but were willing to and did serve in the armed forces as non-combatants (328 U. S. at 67-68, 70). By the same token, the proviso against com-

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plete conscientious objectors contained in all three of the statutes cited above, and especially those passed in 1942, subsequent to the Nationality Act of 1940, is cogent evidence that Congress deemed the oath prescribed by that statute to require, at the least, a willingness to contribute some non-combatant service in aid of the defense of the country in time of war. Petitioner's attitude does not satisfy this requirement.

CONCLUSION

The decision below is in accord with the applicable decisions of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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NOVEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 [illegible] 206

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Kansas Supreme Court (R. 28-32) is reported at 167 Kan. 451.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered June 11, 1949 (R. 28-32), and a motion for rehearing filed July 1, 1949 (R. 32-36), was denied July 8, 1949 (R. 36). The petition for a writ of certiorari was filed October 6,

1949, and was granted December 5, 1949 (R. 37). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3). See also 28 U. S. C. 2101(c).

QUESTION PRESENTED

Whether an alien who, because of religious scruples, states that he would not, if required in time of war or national emergency, serve in the armed forces of the United States in any capacity, combatant or non-combatant, and that he would make no direct contribution to the war effort, by work in war industry or otherwise, meets the standards which Congress has prescribed for naturalization.

STATUTE INVOLVED

Section 307(a) of the Nationality Act of 1940, 8 U. S. C. 707(a) stipulates that:

> No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

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Section 335 of the Nationality Act of 1940, 8 U. S. C. 735, provides:

> (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, * * *.
>
> (b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:
>
> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature.

STATEMENT

Petitioner was born in Germany in 1917, entered the United States in 1937, and has since resided in the United States (R. 4-5, 9-11). He is presently employed as a teacher at Sterling College, Sterling, Kansas (R. 11-12). He married an American citizen in 1943, and at the time of the hearing in November, 1947 (R. 6) they had two children (R. 11, 12, 17).

Petitioner is a member of the Society of Friends and is opposed to any participation in armed conflict. In registering for the draft during World War II, he described himself as a conscientious objector and claimed exemption from both combatant and noncombatant service in the armed forces of the United States (R. 17). In his Selective Service questionnaire, petitioner agreed to perform work of national importance under civilian direction, as authorized by the Selective Training and Service Act of 1940,[1] but limited his commitment to such work "only as will conform with the dictates of my conscience."[2] Thereafter petitioner was classified IV-E, for limited civilian serv-

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[1] Sec. 5(g) Selective Training and Service Act of 1940, 50 U.S.C. App. 305(g).

[2] The record is not entirely clear concerning the petitioner's Selective Service status during World War II. In order to develop a fuller picture of the facts for the benefit of this Court, additional information has been obtained from the Director of Selective Service. Any statements relating to petitioner's Selective Service status which are not fully reflected in the record are based upon information supplied by the Director of Selective Service.

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ice as a conscientious objector (R. 17).[3] His assignment to that category did not remain constant and from time to time his classification was subsequently revised to II-C (deferment as agricultural worker), II-A (occupational deferment other than for agricultural workers), IV-A (deferment because of age), and finally to III-A (deferment for dependents). He did not remain in class IV-E long enough at any time for his name to be reached in its regular order for assignment to a civilian camp for conscientious objectors. Consequently, he never was assigned to such a camp or ordered to do any work of national importance as a conscientious objector. His occupational deferments were based upon his duties as a teacher in various schools alleged to be teaching agriculture, and on employment in agricultural work (R. 10-11, 25).[4]

On May 13, 1947, petitioner filed a petition for naturalization in the District Court of Barton County, Kansas (R. 4-5), whereby he sought naturalization under Section 311 of the Nationality Act of 1940, 8 U. S. C. 711, on the basis of his relationship to a citizen of the United States. While his naturalization application was under consideration, petitioner was examined by a United States

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[3] See 32 C.F.R. 622.5, 623.21(b). A conscientious objector who agreed to perform noncombatant military service was classified 1-A-0, 32 C.F.R. 622.12, 623.21(b).

[4] See note 2, supra.

naturalization examiner and gave the following sworn testimony (R. 23-25; See also R. 13-17):

Q. On April 9, 1947, at Hutchinson, Kansas, you testified before me and you stated that you believed the existence of Armed Service is not necessary in a Christian nation. Is that correct?

A. Yes.

Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?

A. Yes.

Q. Are you an ordained minister?

A. No. I am a member of the Society of Friends which has no ordained ministers.

Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: "Any relief of suffering or any effort of a constructive nature which did not require entering the Armed Forces." Will you explain in more detail what you mean by that answer?

A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs.

Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever?

A. That is correct to this extent. I do not believe in this country engaging in armed

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conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict.

Q. In time of war would you be willing to render any and all services for which you may be physically able to render in furtherance of the war effort of the United States which would not necessitate the wearing of the uniform of one of the armed forces and which would not necessitate the bearing of arms?

A. Only as qualified in my answer to the question next above.

Q. Did it meet with your approval for the United States to send arms and ammunitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?

A. It did not. I was opposed to that.

Q. Are you glad Germany was defeated in the recent war?

A. I was opposed to Nazism in Germany from its inception and I would be pleased if Germany were freed from it but I do not believe it has been nor has it been benefited directly in any way by the war. I also believe the United States has lowered its resistance to Nazi influence because of having expended its energies in an attempt to resist Nazism by armed force.

Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?

A. No.

Q. What, if anything, did you do or try to do in furthering the war effort of the United States during the recent war?

A. Whatever I did would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort. My work was teaching agriculture, testing butter fat and working in UNRRA which work was at all times of national importance and acceptable to my draft board.

Q. In the event it should be permissible in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?

A. Yes.

Q. In the event it should be permissible in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?

A. No.

Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?

A. No.

Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?

A. I have to draw the line some place and I think I should refuse to wear the uniform for

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the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces.

Q. If you were a minister could you wear the uniform as a chaplain?

A. No. Because chaplains are members of the armed services.

On the basis of these statements, the examiner found that petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (R. 5). On petitioner's demand, a hearing was held before the court on November 18, 1947 (R. 6), at which petitioner and his witnesses testified (R. 9-25), the examiner filed his recommendation that the petition be denied (R. 6), and petitioner's statement quoted above was acknowledged by him and introduced in evidence (R. 23-25). At the hearing petitioner asserted also that he subscribed to the principles enunciated in the Constitution of the United States of America and that he was willing to take an oath of allegiance to the United States without any mental reservation (R. 12). However, further inquiry elicited his reservations against any participation in or support of armed conflict in which the United States might become involved (R. 13-18, 23-25).

On February 28, 1948, the court entered a decision finding "that under the authority of *Girouard v. United States,* 328 U. S. 61, * * * said Petitioner should be admitted to citizenship of the United States * * *" (R. 6). Later, on June 23, 1948, after petitioner had filed a motion for judgment in accordance with the court's findings and conclusions, the court entered another order denying the petition for naturalization (R. 7). A motion for a new trial was argued and denied on August 18, 1948 (R. 7). From the order denying his petition for naturalization, Cohnstaedt appealed to the Supreme Court of Kansas, contending that the decision of the United States Supreme Court in the *Girouard* case required his admission to citizenship. However, on June 11, 1949, the Supreme Court of Kansas affirmed the judgment denying his petition for naturalization and concluded that the doctrine of the *Girouard* case related only to the grant of naturalization to one who was willing to serve in the armed forces as a noncombatant (R. 28-32). Petitioner's application for review by this court followed.[5]

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[5] Cohnstaedt has prosecuted his appeals against the United States Immigration and Naturalization Service. Under the naturalization laws the United States is granted status as a possible adverse party in every naturalization proceeding. Sec. 334 (d), Nationality Act of 1940, 8 U.S.C. 734 (d). The United States is the proper party in an appeal from an order granting or denying citizenship. *Bonham* v. *Chi Yan Cham Louie,* 166 F. 2d 15 (C.A. 9). Consequently petitioner appears to have misnamed the adverse party to this proceeding. However, no objection to this apparent irregularity was made at any previous stage in the proceeding, and peti-

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SUMMARY OF ARGUMENT

I

The assertion of religious principles does not relieve even a citizen from legislative measures adopted in furtherance of public safety, morals, and health. Certainly it does not excuse him from the obligation to perform military service in defense of the nation. Any exemptions from such service on the basis of conscientious scruples are a matter of grace rather than right.

Since religious objections cannot preclude the exercise of governmental authority in matters touching the public welfare, they cannot excuse an alien seeking citizenship from observing all requirements of the naturalization laws. Naturalization is a privilege to be granted or withheld in the discretion of Congress. An alien who seeks the award of that privilege has the burden of demonstrating that he has complied fully with the conditions established by Congress. If he cannot meet those conditions, because of conscientious opposition or for any other reason, he cannot be naturalized.

Thus there is no question of legislative power in this case. The only issue presented here is whether Congress actually has required that an applicant for naturalization must at least be willing to par-

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tioner's appeals have been regarded as prosecuted against the United States. The Government did not urge this irregularity in opposing the grant of certiorari and does not challenge it now.

ticipate in some capacity in the war effort of the United States.

II

The naturalization laws require that an applicant must be "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States" and that he take an oath of allegiance agreeing "to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic" and "to bear true faith and allegiance to the same." These requirements demand an affirmative expression of loyalty, a pledge of fidelity and support. They contemplate an inquiry into applicant's attitude towards United States citizenship. An alien cannot win the extraordinary privileges of American citizenship without accepting at the same time the responsibilities inherent in that status. No duty of citizenship is more vital to the nation than the citizen's obligation to aid in the national defense.

For many years the administrators of the statute have read it as requiring an undertaking to bear arms or otherwise contribute to the defense of the nation during time of war or emergency. That reading was supported by the Supreme Court in three decisions. *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636. The most recent pronouncement of this Court, *Girouard*

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v. *United States,* 328 U. S. 61, while it re-examined and modified the doctrine upon which the prior decisions had been based, held no more than that a person who agreed to perform military service in a noncombatant capacity, at a time when Congress had declared such service acceptable as a basis for naturalization, could be granted citizenship. The court did not hold in the *Girouard* case that an alien who would not undertake to make any contribution to the defense of the nation nevertheless could demand the privilege of American citizenship.

Through the years following the *Schwimmer* and *Macintosh* decisions Congress confirmed and adopted the interpretations of the naturalization laws announced in those cases. It accomplished this by failing to amend those statutes to change the rule enunciated by the Supreme Court, although it was making numerous other revisions, by refusing to enact proposed legislation seeking to overcome those decisions, and by failing to make any alteration in the pertinent qualifications—on the contrary, they were clarified and emphasized—when enacting a comprehensive codification of the naturalization laws in 1940, following a seven year study. The *Girouard* decision determined merely that this positive indication of Congressional approval had yielded in a limited area to a later Congressional expression favoring the naturalization of noncombatant members of the armed forces.

There is no comparable expression in the instant case.

III

Cohnstaedt refused to pledge any service or support for the nation during a time of peril. He reserved a right of private judgment superior to the authority and the security of the state. The courts below found that he had not sustained the burden of establishing compliance with the requirements of the naturalization laws. That finding is abundantly supported by the evidence and by the previous rulings of this court, including the *Girouard* case. Therefore petitioner was properly denied citizenship.

ARGUMENT

The issues presented in this case transcend the status of Cohnstaedt or the rights of the group he represents. They involve a consideration of the privileges and responsibilities of American citizenship. They concern the attempt of an individual to assert his own will in opposing urgent public measures adopted by Congress. They deal with the power of our Government to exert its authority in the domain of national self preservation.

That these are warmly disputed issues is underlined by the close divisions in this Court on the four previous occasions when analogous questions were under consideration. *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636; *Girou-*

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ard v. *United States,* 328 U. S. 61. We cannot agree with the petitioner, however, that the latest of these pronouncements—the *Girouard* case—was intended to foreclose further examination of this problem. That decision, as we read it, found that the naturalization statutes permitted the award of citizenship to one who was willing to make important contributions to the national defense, including noncombatant service in the armed forces, during a time of crisis. But the *Girouard* decision did not, we believe, contemplate that the boon of American citizenship would be granted to one who refused to pledge that he would in any way aid in the defense of the nation during its hour of emergency.

In our view, consequently, the decision below did not in any way conflict with the *Girouard* holding. Moreover, we believe that the denial of Cohnstaedt's petition for naturalization was commanded by the requirements of the naturalization laws.

I

Petitioner's Religious Scruples Do Not Exempt Him From the Naturalization Qualifications Prescribed by Congress

Petitioner's contention that Congress, when it enacted the naturalization laws, intended to confer a special status upon conscientious objectors like himself, relies upon the traditional policy expressed by the First Amendment to the United States Constitution, which forbids any law "respecting an

establishment of religion, or prohibiting the free exercise thereof." Freedom of religion is a cornerstone of our society, but the Constitutional postulate assuring each American the "free exercise" of his religion is subject to many obvious limitations even where citizens are concerned. The authority of the State would soon become a mockery if each individual were permitted to consult his own conscience before deciding whether he should obey a law of general application. As this Court pointed out in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26:

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. [6]

Through the years this court has vindicated the paramount authority of the state to compel obedience, even on the part of those professing religious scruples, in areas of public safety, morals and health. That these are matters of paramount national concern is universally agreed. Thus, the plea of religious compulsion has been unavailing as against laws proscribing polygamy (*Reynolds* v. *United States,* 98 U. S. 145), bigamy (*Davis* v. *Beason,* 133 U. S. 333), and interstate transporta-

[6] For similar expressions see *Reynolds* v. *United States,* 98 U.S. 145, 166; *Davis* v. *Beason,* 133 U.S. 333, 342-3; *Cleveland* v. *United States,* 329 U.S. 14, 20.

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tion of women for immoral purposes (*Cleveland* v. *United States*, 329 U. S. 14). That plea also has been unsuccessful in attempts to resist health measures such as those requiring compulsory vaccination (*Jacobson* v. *Massachusetts*, 197 U. S. 11) and safeguarding children on the public streets (*Prince v. Massachusetts*, 321 U. S. 158).[7] Even the cases which have struck down direct encroachments upon individual liberty of speech or religion have conceded the supreme authority of the state in matters of major public concern.[8]

It is also indisputable, we believe, that the farthest expanse of governmental authority is attained during time of war or emergency. Extreme expedients, justifiable only during those critical seasons, are invoked to insure self preservation. See *Hirabayashi* v. *United States*, 320 U. S. 81. A potent weapon in this arsenal of extraordinary authority is the power to demand from each individual military service in defense of the nation. *Selective Draft Law Cases*, 245 U. S. 366. Personal preferences and scruples must yield to the overriding national need. See *Billings* v. *Truesdell*, 321 U. S. 542, 556. As this Court described that concept in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29,

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[7] Other illustrations are cited in *Board of Education* v. *Barnette*, 319 U.S. 624, 655, and McCown, *Conscience* v. *The State*, (1944) 32 Cal. L.R. 1.

[8] See *Board of Education* v. *Barnette*, *supra*; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109.

the liberties safeguarded in the United States Constitution do not deny that each of us

> may be compelled, by force, if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot in its defense.

It is true that Congress at various times has granted special dispensations to conscientious objectors. But those relaxations have by no means been uniform, and indeed until 1940 the religious dissenter was required to perform at least noncombatant military duty.[9] Since Congress has "complete discretion" to fix exemptions from military service, its treatment of conscientious objectors is a matter of grace rather than right. *Falbo* v. *United States,* 320 U. S. 549, 553. Persons professing religious scruples have no absolute or constitutional right to avoid military service. *Rase* v. *United States,* 129 F. 2d 204, 210 (C.A. 6); *Swaczyk*

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[9] The first federal Draft Act of March 3, 1863, 12 Stat. 731, contained no provision for exempting conscientious objectors. It was amended February 24, 1864, 13 Stat. 6, to authorize the assignment of conscientious objectors to noncombatant military duty or to procure release from military duty upon payment of a bounty of $300. Sec. 4 of the Selective Draft Act of May 18, 1917, 40 Stat. 76, permitted the assignment of conscientious objectors to noncombatant military duty. The Selective Training and Service Act of 1940, 54 Stat. 885, authorized for the first time, in Sec. 5(g), an exemption from military duty upon assignment to work of national importance under civilian direction. See also Point IIIA, infra.

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v. *United States*, 156 F. 2d 17 (C.A. 1), certiorari denied, 329 U. S. 726; *Roodenko* v. *United States*, 147 F. 2d 752 (C.A. 10), certiorari denied, 324 U. S. 860. They must accept the classifications established by Congress or suffer the consequences.[10] As the court pointed out in the *Rase* case, *supra:*

> The Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy calling. * * *
>
> No question of religious liberty, in any true sense, is here involved, and the zealous and ill-advised pursuit of a martyr role is not, by the sanction of the Constitution, permitted to imperil national safety without the preservation of which, liberty of conscience and religion will everywhere disappear.

Consequently it seems indisputable that religious objections cannot defeat the exercise of governmental authority in the domain of public welfare. And it is patent also that in the control of aliens, including authority to prescribe the conditions of entry and to establish grounds for deportation, the

[10] See Elliff, *Prosecution of Conscientious Objectors under the Selective Service Act*, (1944) 6 Fed. Bar Journ. 41. The classification could be judicially questioned only after exhausting all administrative remedies, usually after induction, and upon a showing that the classification had no basis in fact or law. *Estep* v. *United States*, 327 U.S. 114; *Gibson* v. *United States*, 329 U.S. 338; *Eagles* v. *Samuels*, 329 U.S. 304; *Cox* v. *United States*, 332 U.S. 442. See also *Hirabayashi* v. *United States*, 320 U.S. 81, 108.

power of Congress is absolute.[11] A comparable sweep of authority may be observed with regard to the fixing of the qualifications for naturalization. The United States Constitution empowers Congress "to establish an uniform Rule of Naturalization". Article I, Section 8. It follows, therefore, that the conditions under which an alien may be awarded United States citizenship are defined exclusively by Congress, and are subject to no limitation except that the standards must be uniform throughout the United States.[12] Consequently no alien can claim an absolute right to be naturalized as a citizen of the United States. *Luria* v. *United States,* 231 U. S. 9, 23. Since it has plenary authority in this area of legislative responsibility Congress may grant or withhold the privilege of naturalization under any uniform conditions that are satisfactory to it. *United States* v. *Ginsberg,* 243 U. S. 472.

Naturalization is thus a privilege rather than a right. An alien who seeks this privilege must conform strictly with the requirements established by

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[11] *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U.S. 320; *Fong Yue Ting* v. *United States,* 149 U.S. 698. The supremacy of federal authority in this realm excludes any intervention by the states. *Hines* v. *Davidowitz,* 312 U.S. 52. In the *Stranahan* case, *supra,* at p. 339, this Court declared, in discussing the authority to regulate the admission of aliens, that "over no conceivable subject is the legislative power of Congress more complete * * *". See also *United States ex rel. Knauff* v. *Shaughnessy,* No. 54, this Term, decided Jan. 16, 1950.

[12] The Constitutional mandate for a uniform naturalization rule contemplates only geographical uniformity and does not require full equality of treatment for each class of naturalization applicants. *Samras* v. *United States,* 125 F. 2d 879 (C.A. 9), certiorari denied, 317 U.S. 634.

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statute. *United States v. Ness*, 245 U. S. 319. If he cannot demonstrate such compliance his petition must fail. *Maney v. United States*, 278 U. S. 17. Congress has emphasized this precept by declaring that a person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed by statute, and not otherwise. Sec. 301(d), Nationality Act of 1940, 8 U. S. C. 701(d). Only after he has complied fully with the established requirements can an applicant claim a right to be naturalized. *Tutun v. United States*, 270 U. S. 568.

In recent years this Court has underscored the inestimable value of American citizenship, and has insisted that the status of a naturalized citizen may be extinguished only upon the strongest showing of impropriety. *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665; *Knauer v. United States*, 328 U. S. 654; *Klapprott v. United States*, 335 U. S. 601. But at the same time this Court has observed, *Baumgartner v. United States, supra*, at p. 676:

> We are fully mindful that due observance of the law governing the grant of citizenship to aliens touches the very well-being of the Nation. Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded.

Because the citizenship status, once granted, is so difficult to take away, it is essential that the

keenest vigilance be exercised to prevent the naturalization of unworthy applicants. Moreover, the petitioner for naturalization, in common with all litigants who seek to win benefits allowed by law, must shoulder the burden of proving that he possesses the specified qualifications.[13] *Tutun v. United States, supra.* If there are any doubts whether citizenship should be awarded they generally must be resolved in favor of the United States and against the petitioner. *United States v. Manzi,* 276 U. S. 463.

These general principles have never been seriously contested. Indeed, they have been iterated or assumed in every previous decision by this Court dealing with cognate problems under the naturalization laws. Prevailing and dissenting opinions alike[14] started from the premise that Congress, acting within its orbit of plenary authority and defining privileges not available without its sanction, could deny naturalization to aliens unwilling to share in the defense of the nation. There has been division of opinion only as to whether Con-

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[13] The burden of proof is thus quite different from that in proceedings to revoke naturalization, in which the Government must establish fraud or illegality by "clear, unequivocal, and convincing" evidence. *Schneiderman* v. *United States, supra.*

[14] The only possible exception is the dissenting opinion of Justice Holmes in the *Schwimmer* case, in which the exact basis for the dissent apparently is not indicated. In all likelihood, however, the basis for that dissent was intended to be identical with the fuller dissenting opinion of Chief Justice Hughes, two years later, in the *Macintosh* case, which conceded the power of Congress to bar the naturalization of conscientious objectors if it desired to do so.

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gress actually has established such a requirement in the naturalization laws.

This point of agreement is clarified and accentuated by two decisions of this Court, neither of which ever has been questioned or overruled. *Hamilton v. Regents,* 293 U. S. 245, arose as the result of a California statute which required students at the State university to take a course of study in military science and tactics. A number of students refused to take this course, asserting that it collided with their religious and conscientious scruples. They were suspended from the university and brought suit challenging the validity of the state law. In a unanimous decision [15] the Supreme Court rejected their challenge. The concurring opinion of Justice Cardozo, joined by Justices Brandeis and Stone,[16] made the following observations, 293 U. S. at 265-266, 268:

> The petitioners * * * have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its

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[15] This unanimity is particularly significant in the light of the divisions in the *Schwimmer* and *Macintosh* cases, decided respectively 5 years and 3 years earlier.

[16] Justice Brandeis had dissented from the *Schwimmer* and *Macintosh* decisions. Justice Stone had voted with the majority in *Schwimmer,* but had dissented in *Macintosh.*

welfare.[17] This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law. * * *

* * * * *

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

In re Summers, 325 U. S. 561, was decided by this Court less than a year prior to its decision in the *Girouard* case. There a native born citizen was excluded from admission to the bar of Illinois because he was a believer in passive resistance, was

[17] In *Board of Education* v. *Barnette,* supra, the *Hamilton* case was distinguished on the ground that it involved school attendance which was optional, rather than compulsory.

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opposed to violence, and would not undertake to perform military service. The Illinois courts found that the prerequisite oath of allegiance, similar to that exacted in naturalization cases, encompassed an undertaking to perform military service. The prevailing opinion of this Court, written by Justice Reed, repulsed a claim that this requirement impaired the Constitutional liberty of religion, and stated, 325 U. S. at 570-571, 572-573:

> The responsibility for choice as to the freedom of its bar rests with Illinois. * * * Of course, under our Constitutional system, men would not be excluded from the practice of law, or indeed from following any calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line. We cannot say that any such purpose to discriminate motivated the action of the Illinois Supreme Court.
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> * * * * *
>
> The United States does not admit to citizenship the alien who refuses to pledge military service. * * * Even the powerful dissents which emphasized the deep cleavage in this Court on the issue of admission to citizenship did not challenge the right of Congress to require military service from every able-bodied man. * * * It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution

> of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship.

We believe these decisions, read with the authorities previously discussed, establish decisively the principle that one who wishes to seek a limited privilege must meet the conditions that are prescribed, regardless of his conscientious objections. And it follows irresistibly, in our opinion, that an applicant for naturalization may not obtain citizenship in defiance of a contrary Congressional directive, merely because conscientious scruples prevent him from satisfying the generally applicable qualifications. He must comply fully with the conditions fixed by Congress, or forego the privilege of naturalization. Thus the only crucial question in this case is whether Congress has required that an applicant for naturalization must promise full support to the Nation during time of war or emergency.

II

The Naturalization Statutes Preclude an Award of Citizenship to an Alien Conscientious Objector Who Refuses to Pledge Participation in the Defense of the United States During Time of War or Emergency

In opposing Cohnstaedt's naturalization the Government has not questioned the sincerity of his con-

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victions, nor has it impeached his character. The petition is resisted solely on the basis of the reservations announced by the petitioner himself in defining his attitude toward American citizenship. His refusal to promise to support and defend the nation if called upon during any emergency, present or future, disqualifies him, in our opinion, from the benefits of American citizenship. We base this view upon a reading of the naturalization statutes, upon the legislative attitude and the administrative interpretation, and upon the previous decisions of this court.

A. The Provisions of the Naturalization Laws

Two separate requirements of the naturalization laws govern the disposition of this case. Because they manifestly are interrelated, we consider them together. First, there is the injunction in Sec. 307(a) of the Nationality Act of 1940 against the naturalization of any person unless he "is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." Secondly, there is the command, in Sec. 335 of the Nationality Act, that a naturalization petitioner before his admission to citizenship must take an oath of renunciation and allegiance which shall include undertakings "to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic"

and "to bear true faith and allegiance to the same." [18] The form of the oath to be taken by each candidate for citizenship has been embodied in the statute itself since 1940.[19] It is evident that these directives are of the highest significance. In some measure they have been included in the design of the naturalization statutes almost since the beginnings of our national existence.[20] They have the

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[18] Earlier in the same section the applicant is required to pledge that he will "support the Constitution of the United States." The repetition of language makes it clear that the later directives of that section, quoted above, deal with a pledge to contribute to the national defense. This also is clear from the promise to defend against all enemies "foreign and domestic".

[19] Before then the statute merely recited the substance of the oath, and the precise form of the oath was prescribed only by administrative regulation in Rule 8(c) of the Naturalization Regulations of July 1, 1929.

[20] The first naturalization statute of March 26, 1790, 1 Stat. 103, merely directed that the applicant for naturalization take an oath "to support the constitution of the United States." The revision of January 29, 1795, 1 Stat. 414, added the requirement that the applicant must establish to the satisfaction of the court that he is "attached to the constitution of the United States, and well disposed to the good order and happiness of the same." No important changes were made in succeeding naturalization laws. The Naturalization Act of June 29, 1906, in Sec. 4, Third, 34 Stat. 596, amplified the prescribed form of the oath of allegiance and provided for the first time that the applicant's oath must include commitments that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." The contemporaneous materials do not offer any explanation for this amplification. See H. Doc. 46, 59th Cong., 1st Sess.; H. Reps. 1789 and 5075, S. Rep. 4373, 59th Cong., 1st Sess. It is possible, however, that the provisions regarding the oath of allegiance were revised so that they would conform substantially with comparable provisions regarding oaths of allegiance prescribed in other connections. See R. S. 1757, 5 U.S.C. 16.

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most vital bearing on the applicant's fitness for American citizenship.

In discharging its Constitutional mandate Congress quite properly has regarded the naturalization process as a matter of the gravest moment. Our traditions of freedom and the needs of a growing nation have been crystallized in a generous national policy favoring the naturalization of deserving aliens. But Congress never has fully opened the gates for all aliens who might desire the blessings of American citizenship. Standards of residence, character, and loyalty have been prescribed, and provision has been made for searching inquiry by administrative officers and by the naturalization courts. The procedures have been designed to evaluate the applicant in the light of his performance and promise, to probe his understanding and appreciation of the responsibilities of American citizenship, and to determine whether the interests of the nation would be served by admitting him to full and equal status as an American citizen. As this Court has stated, in *Luria* v. *United States*, 231 U. S. 9, 23:

> These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect

> of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than what they told of the past.

The statutory command that an applicant for naturalization must be attached to the principles of the Constitution and well disposed to the good order and happiness of the United States is couched in the most general terms. This generality of language largely defeats any attempts at precise definition. See *Schneiderman* v. *United States*, 320 U. S. 118, 139. But at the same time it is clear that Congress demanded from each naturalization applicant an undivided loyalty and a pledge of firm support for the nation he wished to join.

> Attachment to the principles of the Constitution * * * implies, I think, a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them. It is to persons holding such views, and to them only, that citizenship in this country is open.

In re Shanin, 278 Fed. 739 (D. Mass). See also *In re Saralieff*, 59 F. 2d 436 (E.D.Mo.); *In re Bevelacqua*, 295 Fed. 862 (D. Mass.).

Manifestly, the ascertainment of whether a person is attached and favorably disposed to the United States entails an exploration of his mental processes guided principally by his own testimony and

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his previous behavior. An apt description of this process may be found in *Allan* v. *United States,* 115 F. 2d 804 (C.A. 9):

> The burden of proof on appellant is to show a mental condition, i.e., his *attachment* to the principles of the Constitution and possession of a certain *disposition* towards the good order and happiness of the United States. Obviously, the petitioner's testimony concerning his mental attitude is of primary importance in establishing his burden of proof. [Emphasis original.]

Another decisive element in divining the applicant's attitude toward the United States is the oath of allegiance he must take as an integral part of his naturalization proceeding. That oath "relates to a state of mind and is a promise of future conduct. It is the final act by which the alien acquires the status of citizen." *Knauer* v. *United States,* 328 U. S. 654, 671. Under the very terms and nature of the oath itself, and by explicit statutory direction, that oath must be taken without any reservations. Id. *Baumgartner* v. *United States,* 322 U. S. 665.

In assessing the worth of a naturalization applicant no account is taken of his position, his wealth, or even his education.[21] Under our scheme of government those factors are not relevant in the pro-

[21] The only educational qualifications are that the applicant for naturalization, if physically capable, must be able to speak the English language and must sign the petition for naturalization in his own handwriting. Secs. 304 and 332, Nationality Act of 1940, 8 U.S.C. 704 and 732.

nouncement of judgment. However humble his station, an alien resident may aspire to become an equal member in the select fellowship of American citizenship. In return for this incalculable privilege he is asked to pledge an undivided fidelity and an affirmative support for the nation. American citizenship brings many benefits, but it demands in return the assumption of duties that must be performed if the social order, which gives to American citizenship its high value, is to survive. Citizenship in the United States would indeed be cheaply won if an alien could claim it without promising to assume the obligations inherent in that status or if he were permitted to announce which of those obligations he would choose to honor.

Little purpose would be served by attempting to enumerate all the duties which an American citizen owes his country. But in a survey of their relative importance it is likely that most Americans would rate the citizen's contribution to the national defense in time of crisis as most vital. Like many other responsibilities of citizenship, this duty frequently entails inconvenience, hardship, and even personal risk. However, each good citizen willingly makes the sacrifices that are required of him as his contribution to the common welfare. That is a privilege and a responsibility of good citizenship. As this Court pointed out in *Hamilton* v. *Regents*, 293 U. S. 245, 262:

> Government, federal and state, each in its own sphere owes a duty to the people within its

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> jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies.

See also *Selective Draft Law Cases*, 245 U. S. 366; *In re Siem*, 284 Fed. 868 (D. Mont.).

In our view the Congress of the United States and the great body of American citizens expect that an alien who wishes to join our ranks will agree to assume his share of the burdens of American citizenship, including the obligation to aid in the nation's defense when called upon to do so. We believe that his willingness to make that pledge is a true measure of attachment to our institutions. An alien who declines to promise any such support to the nation or who reserves the right to determine for himself whether he will obey the nation's call cannot, in our opinion, establish that he is attached and well disposed to the United States and cannot unreservedly take an oath that he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that he will bear true faith and allegiance to the same. Consequently, he has failed to satisfy the conditions prescribed by Congress and does not merit the bestowal of American citizenship.

B. The Administrative and Judicial Construction

At least since 1923[22] the Immigration and Naturalization Service, which is charged with administrative supervision over the naturalization process,[23] consistently has taken the position that every applicant for naturalization must promise to support and defend the United States during time of war or emergency, if called upon to do so. While that administrative view is not necessarily controlling, it should be given weight in construing the statute. Moreover that reading of the statute has been approved by this Court.

The first such case to reach the United States Supreme Court, in 1929, was *United States* v. *Schwimmer,* 279 U. S. 644. Mrs. Schwimmer described herself as an uncompromising pacifist "with no sense of nationalism, but only a cosmic consciousness of belonging to the human family." 279 U. S. at 648. She was willing to take the oath of allegiance but would not agree to bear arms if her services were required. Her petition for naturalization was rejected by a divided Court, three judges dissenting. The Court concluded that petitioner was disqualified from naturalization on two

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[22] Since 1923, the preliminary application form that must be filed by each person who seeks naturalization, has required each naturalization applicant to answer substantially the following question: "If necessary, are you willing to take up arms in defense of the United States?" This now appears as question 21 on the final application form N-400.

[23] Sec. 327, Nationality Act of 1940, 8 U.S.C. 727.

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grounds: (1) she could not establish that she was attached to the Constitution and well disposed to the good order and happiness of the United States; (2) she could not take an unqualified oath of allegiance. The majority opinion stated (279 U. S. at 650-651):

> That it is the duty of citizens by force of arms to defend our government whenever necessity arises is a fundamental principle of our Constitution.
>
> * * * * *
>
> Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization.

In his dissenting opinion Justice Holmes declared, 279 U. S. at 654:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

Two years later the Supreme Court again was confronted with similar issues in *United States v. Macintosh,* 283 U. S. 605, and *United States v. Bland,* 283 U. S. 636. Macintosh was an ordained minister and a professor of theology at Yale University, who had served as a Chaplain in the Canadian Army during World War I. In applying for naturalization he insisted that he was willing to take the oath of allegiance. He stated, however, that while he was not necessarily opposed to all wars he would agree to support a military undertaking engaged in by the United States only if he believed the war was morally justified. 283 U. S. at 617-619. He thus reserved a right to pass private judgment in determining whether he would support and defend the United States. The Supreme Court again found itself divided, this time 5 to 4. The prevailing opinion rejected the petition for naturalization and declared, 283 U. S. at 626:

> It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is opened for others, with utter confusion as the probable final result.

Chief Justice Hughes, in his dissenting opinion, conceded that Congress could require that an applicant for naturalization must promise to bear arms

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in defense of the United States, but denied that there was any such requirement in the naturalization laws. He argued that the oath of public officers, similar to that exacted of naturalization applicants, never had been understood to include an agreement to perform military service, that Congress always had been generous in granting exemption from compulsory military service to conscientious objectors, and made the following additional comments, 283 U. S. at 630-631, 635:

> It goes without saying that it was not the intention of the Congress in framing the oath to impose a religious test * * * I think that the requirement of the oath * * * should be read in the light of our regard from the beginning for freedom of conscience. * * *
>
> * * * * *
>
> * * * the requirement of "attachment to the principles of the Constitution" * * * again, is a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience.

The applicant for naturalization in the *Bland* case, decided the same day as *Macintosh* and on the same grounds, was a nurse who had spent nine months in the United States Army in France during World War I, and who insisted on qualifying her pledge to support and defend the United States by adding in writing the statement "as far as my conscience as a Christian will allow." The major-

ity of the court ruled that "the words of the statute do not admit of the qualification upon which the applicant insists." 283 U. S. at 636, 637.

The next direct holding by the Supreme Court on a related issue was *Girouard v. United States*, 328 U. S. 61, which arose during World War II. However, it is important to observe that in two intervening decisions in somewhat analogous situations the Supreme Court recognized and confirmed the doctrines it previously had enunciated in the *Schwimmer, Macintosh* and *Bland* decisions. See *Hamilton v. Regents* and *In re Summers*, discussed under point Point I, *supra*.

Girouard, like his predecessors, asserted that he believed in the form of government in the United States and was willing to take the oath of allegiance. However, he indicated that he was a member of the Seventh Day Adventist sect and therefore had religious scruples against combatant military duty, although willing to serve the United States in any other capacity that would not require him to bear arms, including noncombatant service in the armed forces. In resolving this issue the Supreme Court again was divided—this time the vote was 5 to 3. The majority expressed disagreement with the *Schwimmer, Macintosh* and *Bland* decisions, to the extent that they barred an alien from naturalization because of his refusal to bear arms. 328 U. S. at 63, 69. The nub of its holding is found, we believe, in the following excerpt from the prevailing opinion, 328 U. S. at 64-65:

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The *bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended,* even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that "the Quakers have done their share to make the country what it is." And the annals of the recent war show that many whose religious scruples prevented them from bearing arms nevertheless were *unselfish participants in the war effort.* Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. *One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants.* One may adhere to what he deems to be his obligation to God and yet *assume all military risks* to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. *Each is making the utmost*

> *contribution* according to his capacity. The fact that his role may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on *his willingness to support and defend it to his utmost.* [Emphasis supplied.]

The dissenting opinion of Chief Justice Stone found that the interpretation of the naturalization statutes announced by the Supreme Court in its three earlier decisions had been adopted and confirmed by Congress. The solid basis for that view will be considered at a subsequent point.

In seeking reversal of the judgment below, petitioner contends that the court's determination conflicted with the ruling of the *Girouard* case. We find no such conflict. As we read it, the *Girouard* decision did not hold that a man who declined to pledge any type of support for the nation during a critical hour, or who withheld an agreement to perform other duties of citizenship because of alleged religious scruples, must necessarily be naturalized. Carried to its logical extremity, such an assumption would mean that citizenship could be demanded by a person who threatened, in consonance with the dictates of his own conscience, that he would not make even the most minute contribution to the national defense, or that he would actively oppose any military enterprises engaged in by the Government and would counsel others to

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oppose such measures,[24] or even that he would consort with a potential enemy to defeat the nation's war effort, or that he would engage in any other course of action opposed to the national interest which his religious scruples or whims might project.

Although the prevailing opinion expressed the view that "the *Schwimmer, Macintosh* and *Bland* cases do not state the correct rule of law," 328 U. S. at 69, we do not understand that the *Girouard* decision was intended to support any such far-reaching suppositions as those mentioned in the preceding paragraph. On the contrary, we think that the Court in that case was concerned with an individual who undertook to make an important contribution to the national defense, in the form of noncombatant military service. At most the Court disagreed with *the rule* of the *Schwimmer, Macintosh* and *Bland* cases to the extent that it related to the actual bearing of arms. In the quoted passage the majority opinion emphasized that the Court then spoke of a person who actually was willing to support and defend our institutions and to participate in "the great cooperative effort necessary for victory." The Court indicated clearly that it was referring to "unselfish participants in the war effort", to a person who "may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a

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[24] See dissenting opinion of Chief Justice Stone in *Girouard* case, 328 U.S. at 72, n. 1.

rifle," and who was "making the utmost contribution according to his capacity." In our view that language does not warrant any assumption that naturalization must be granted to a person who, for whatever reason, would not agree to support and defend the United States in any way against a foreign enemy or who insisted on making his own individual determination, when the emergency exploded, as to whether or not he would respond to the nation's call.

In the *Girouard* case this Court was confronted with an exceptional factual situation. It was dealing with a person who professed complete willingness to render military service, as a member of the armed forces assigned to noncombatant duties. Ten thousand adherents of his sect—the Seventh Day Adventists—actually did perform noncombatant military service during World War II, some with conspicuous heroism.[25] When accepted into the armed forces, such persons took the prescribed oath of allegiance. Moreover, Congress had made special provision for the naturalization of noncitizens who served in the armed forces of the United States during World War II, excluding only "any conscientious objector who performed no military duty whatever or refused to wear the uni-

[25] See *Girouard* v. *United States*, *supra*, 328 U.S. at 62. Petitioner's brief in that case, No. 572, October Term, 1945, pp. 18, 29, pointed out that one noncombatant Seventh Day Adventist in the Army received the Congressional Medal of Honor and also listed numerous other military decorations awarded to members of that sect.

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form." Sec. 1001, Second War Powers Act of March 27, 1942, 56 Stat. 176, 182.[26] Conscientious objectors who did render military service and wore the uniform thus apparently were made eligible for the special naturalization benefits of this Act. *In re Kinloch*, 53 F. Supp. 521 (W. D. Wash.); *In re Sawyer*, 59 F. Supp. 428 (D. Del.). Cf. *In re Nielsen*, 60 F. Supp. 240 (D. D. C.). From these circumstances the Court concluded that Congress also wished to accord the privilege of citizenship, under the ordinary naturalization procedures, to a conscientious objector who was prepared to perform such noncombatant military duty, although not called upon actually to do so. See 328 U. S. at 64, 70. In other words, the prevailing holding in that case regarded such an individual as one who was willing to contribute to the support and defense of the United States against its enemies. It did not, in our reading, purport to endorse the naturalization of one who declined to pledge any such contribution to the national defense.

The majority's reading of the legislative mind in the *Girouard* case was by no means free from doubt, as is made clear by the dissenting opinion of Chief Justice Stone. (And see *infra*, pp. 47 to 57.)

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[26] See also Act of December 7, 1942, 56 Stat. 1041, which conferred similar benefits upon veterans of World War I and earlier wars. A later enactment of June 1, 1948, which added Sec. 324A to the Nationality Act of 1940, 62 Stat. 281, 8 U.S.C. 724a, codified and extended the naturalization benefits available to the veterans of World War II and World War I. The 1948 Act made like provision regarding conscientious objectors who performed no service or refused to wear the uniform.

But even if there were no such doubt, it would be a very long step to the deduction which the present petitioner asks the Court to make (Br. pp. 6-7): that Congress, by expressly excluding from the naturalization benefits accorded by the Second War Powers Act a conscientious objector who might have acquired, against his will, technical military status but who "performed no military duty whatever or refused to wear the uniform", intended thereby to make such persons eligible for naturalization under ordinary procedures—despite the fact that the general naturalization law had been long and uniformly construed to deny naturalization to such persons, and the further fact (see *infra*, pp. 47 to 57) that Congress, with full knowledge of this administrative and judicial construction, had repeatedly refused to amend the statute to make such persons eligible. The argument that Congress chose this indirect and tortuous method of enacting that which it had refused to enact directly, betrays a strange conception of the legislative process. In fact, the purpose of the exception in the naturalization provisions of the Second War Powers Act is perfectly plain. Those provisions of the Act were designed to reward aliens who served in the armed forces of the United States during World War II. They contained generous exemptions from the ordinary requirements of the naturalization laws. If no reservation had been provided the statute was amenable to the construction that any

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alien who was a member of the armed forces, even a conscientious objector, could qualify for its benefits. By inserting the qualification in question Congress clearly indicated that it desired to withhold its bounty from conscientious objectors who might have a technical status as members of the armed forces, but who had performed no military duty or refused to wear the uniform.

Although the legislative history throws no light on the Congressional design in the 1942 Act or its 1948 codification,[27] earlier legislative developments do provide some illumination. The 1942 Act was successor to earlier legislation extending benefits under the naturalization laws to veterans of World War I. The earliest versions of that legislation contained no reservation specifically barring conscientious objectors.[28] The statute of May 26, 1926, 44 Stat. 654, introduced this reservation for the first time, and it has been continued in subsequent enactments.[29] Although the 1926 legislative history likewise is unrevealing,[30] it seems apparent

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[27] See S. Reps. 989, 1664 and H. Rep. 1765, 1896, 77th Cong., 2d Sess.; 88 Cong. Rec. 1589, 1790-1791, 1794; H. Rep. 1408, S. Rep. 1207, 80th Cong. 2d Sess.; 94 Cong. Rec. 1947-1948.

[28] Act of May 8, 1918, 40 Stat. 542; Act of July 19, 1919, 41 Stat. 222.

[29] In addition to the statutes already cited see Act of March 4, 1929, 45 Stat. 1545; Act of May 25, 1932, 47 Stat. 165; Act of June 24, 1935, 49 Stat. 395; Act of August 23, 1937, 50 Stat. 743; Act of June 21, 1939, 53 Stat. 851.

[30] The original drafts of the 1926 Act did not contain this stipulation. H. Rep. 382, S. Rep. 566, 69th Cong. 1st Sess. It was included in a revised draft, which ultimately was

that the reservation was interpolated in order to conform the special naturalization benefits to like limitations in other statutory bounties awarded to veterans of World War I.[31] The legislation of that war [32] required that conscientious objectors be inducted into military service, and then authorized their assignment to noncombatant duties or, in some cases, their discharge or furlough. See *Statement Concerning the Treatment of Conscientious Objectors in the Army* (War Dept. 1919). Many such conscientious objectors never wore the uniform or performed any military service. *Id.*, p. 32. The reservation in the special naturalization statutes rewarding service during World War I, and in the later statutes, was intended to make plain the legislative wish to withhold any benefits from such persons, whose technical status in the armed forces otherwise might have been regarded as "service." The limited bounty to conscientious objectors who actually served hardly can be perverted, in our opinion, into an expression of approval of the naturalization, under the general laws, of conscientious ob-

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enacted, submitted as a substitute by the Committee spokesman on the floor of the Senate to incorporate changes suggested by the legislative drafting service, without further explanation. 67 Cong. Rec. 7957.

[31] See 38 U.S.C. 447, 693g. The legislative development of this restriction in the veterans' benefits act likewise does not contain any direct explanation of the legislative purpose. See H. Rep. 763, 68th Cong., 1st sess.; Hearings on H. R. 10271, 68th Cong., 2d Sess.

[32] For comparison of World War I and World War II practice regarding such inductions see *Billings* v. *Truesdell*, 321 U.S. 542.

jectors who neither rendered nor were willing to render such service. On the contrary, we are unable to find that Congress, either directly or indirectly, ever sanctioned an award of naturalization under such circumstances.

C. *The Administrative and Judicial Construction of the Naturalization Laws Was Confirmed and Reenacted by Congress.*

In the *Girouard* case the Government contended that the interpretation of the naturalization laws expressed in the *Schwimmer*, *Macintosh* and *Bland* decisions had been ratified by Congress in the ensuing years. That view was adopted by Chief Justice Stone and constituted the entire basis for his dissenting opinion. However, the majority took a contrary view and concluded that the special naturalization legislation of 1942, awarding naturalization benefits to members of the armed forces, sufficiently expressed a Congressional purpose to permit the naturalization, under the general law, of conscientious objectors who were willing to serve in a noncombatant capacity. 328 U. S. at 70. That interpretation is not involved in the instant case. Congress indubitably can modify the requirements for naturalization to any extent that it may deem desirable, and we need not question, for present purposes, that such a modification was made in relation to conscientious objectors who were willing to serve as noncombatant members of the armed forces. But since we regard the holding of the

Girouard case as limited to that point, and since, with respect to conscientious objectors like this petitioner, there is no expression of Congressional intention akin to that upon which the majority relied in the *Girouard* case, we again present to this court the evidence, which impresses us as most persuasive, that Congress confirmed and accepted the interpretation of the naturalization statutes expressed in the *Schwimmer, Macintosh* and *Bland* decisions. In support of that position we invite attention to the following sequence of events.

1. The *Schwimmer, Macintosh* and *Bland* decisions found that the naturalization statutes contained positive requirements barring the grant of citizenship to an alien who was unwilling without qualification to bear arms in defense of the United States. Those decisions were generally regarded as laying down a broad general rule. See *In re Summers,* 325 U. S. 561, 572. Coming during time of peace, when opposition to war had substantial popular support, those decisions aroused considerable comment and controversy. They were well known to the members of Congress, because of discussions in the press and on the floor of Congress. Consequently it can be assumed, as a fact rather than as an abstraction, that Congress was fully aware of the doctrine that had been propounded in those cases.

2. On other occasions, when it has found itself in disagreement with interpretations of this court,

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Congress has not hesitated to amend the relevant statutory provisions. See, for example, Sec. 23, Act of June 28, 1940, 8 U.S.C. 137, adopted to overcome *Kessler* v. *Strecker,* 307 U. S. 22. See also H. Rep. 994, 76th Cong., 1st. Sess.; S. Rep. 1721 and H. Rep. 2683, 76th Cong., 3rd. Sess.; *Bridges* v. *Wixon,* 326 U. S. 135. Yet Congress never made any affirmative change in the statutory provisions which had been construed to forbid the naturalization of conscientious objectors, despite the fact that the state and lower federal Courts were following and applying the rule enunciated by this court. *Beale* v. *United States,* 71 F. 2d 737 (C.A. 8); *In re Warentkin,* 93 F. 2d 42 (C.A. 7), certiorari denied, 304 U. S. 563; *Shelley* v. *United States,* 120 F. 2d 734 (C.A. D.C.); *Clarke's Case,* 301 Pa. 321.

3. Between 1929, the year of the *Schwimmer* decision, and 1940, when Congress codified the naturalization laws in the Nationality Act of 1940, there were numerous amendments and revisions of the naturalization laws. See *Immigration and Nationality Laws and Regulations* (1944), pp. 541-567. Not one of those amendments dealt with the requirement that an alien seeking admission to citizenship must be willing to bear arms or otherwise contribute to the support and defense of the United States to the extent of his ability.

4. Commencing immediately after the *Schwimmer* decision and continuing for more than ten

years, there were vigorous and repeated attempts to persuade Congress to change the naturalization statute in order to eliminate or modify the requirements which had been interpreted by the Supreme Court as barring conscientious objectors to military service. H. R. 3547, 71st Cong., 1st. sess., 71 Cong. Rec. 2184; H. R. 297, 72d Cong., 1st sess.; H. R. 298, 72d Cong., 1st Sess.; S. 3275, 72d Cong., 1st sess.; H.R. 1528, 73d Cong., 1st sess.; H.R. 5170, 74th Cong., 1st sess., H.R. 8259, 75th Cong., 1st sess., S. 165, 75th Cong., 1st sess. We believe it is of the most vital significance that Congress refused to approve any of these measures, although the proposal was continuously before it from May 29, 1929, two days after the decision in the *Schwimmer* case, through 1940.

The basic pattern of all these measures was that of H. R. 297, 72d Cong., 1st sess. *supra,* introduced by Mr. Griffin at the first session of Congress after the *Macintosh* decision, which was entitled "A Bill to provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from becoming citizens." In pertinent part, it provided that the Fourth subdivision of Section 4 of the Act of June 29, 1906 (*supra,* p. 28) should be amended by adding the following sentence:

> Except that no person mentally, morally, and otherwise qualified shall be debarred from citizenship by reason of his or her religious

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> views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen.[33]

Hearings were had before the House Committee on Immigration and Naturalization on H. R. 3547, 71st Cong., 1st sess., and on H. R. 297, 72d Cong., 1st sess., in May 1930 and January 1932, respectively. The proponents of these bills, among whom were included representatives of religious groups, stated clearly their purposes to overrule the interpretation placed on the oath by the *Schwimmer,* and *Macintosh* cases. Hearings on H. R. 3547, pp. 12, 22, 29-57, 73-109, 169-180; Hearings on H. R. 297, pp. 4-7, 10, 12, 15-19, 41-48, 53-56, 66-81, 147, 148. There was opposition on each occasion. Hearings on H. R. 3547, pp. 57-65, 73, 146-169, 181-212; Hearings on H. R. 297, pp. 85-140. Neither bill was reported out.

Bills identical with H. R. 297 were introduced in three later Congresses; these, likewise, never emerged from the files of the committee. H. R. 1528, 73d Cong., 1st sess.; H. R. 5170, 74th Cong., 1st sess.; H. R. 8259, 75th Cong., 1st sess. Other proposals which differed in minor particulars met

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[33] H.R. 3547, 71st Cong., 1st sess., and H.R. 298, 72d Cong., 1st sess. differed only in the circumstance that they omitted the last clause, beginning "but every alien." The former bill was introduced two days after the *Schwimmer* decision had been handed down.

a like fate, death in committee. See S. 165, 75th Cong., 1st Sess., and S. 3275, 72d Cong., 1st sess.

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before the national legislature, in one form or another, proposals urging a legislative reversal of the doctrine of the *Schwimmer, Macintosh,* and *Bland* cases. That Congress declined to enact these proposals, after hearings and after speeches advocating the change (72 Cong. Rec. 6966-6967; 75 Cong. Rec. 15354-15357), speeches which praised the dissenting opinions, seems to us conclusive proof that the prevailing opinions in this Court reflected the prevailing opinion in the Congress.

As the Court of Appeals for the Eighth Circuit said in *Beale v. United States, supra,* affirming an order which refused to admit to citizenship a person unwilling to bear arms because of conscientious reasons, 71 F. 2d at 739:

> having in mind that Congress is vested with the power and authority to fix and determine the conditions upon which the privilege of citizenship may be conferred, it is worthy of note that there have been no amendments affecting the provisions of the statutes relating to the requirements for the admission to citizenship. We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have congressional sanction and approval.

5. Even more decisive, perhaps, is the clear expression of approval found in the history of the

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Nationality Act of 1940. That statute was the culmination of an exhaustive seven year study. It was drafted by a Cabinet Committee, consisting of the Secretary of State, the Attorney General, and the Secretary of Labor, following protracted consideration and discussion of each provision of the nationality laws. The final report of the Cabinet Committee suggested a complete revision and codification of the nationality laws and documented its report with a thorough discussion of each proposed section of the statute. See *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st sess. After submission of the Cabinet Committee's report, Congress embarked upon a section-by-section examination of each provision of the proposed new nationality code.[34]

Yet in all those proceedings there is no suggestion that Congress was dissatisfied with the rule enunciated in the *Schwimmer, Macintosh* and *Bland* decisions. And the Nationality Act of 1940, as finally adopted, made no attempt to change that rule. Indeed the Nationality Act made two pertinent revisions which add significantly to the evidence that Congress had considered and acquiesced in the doctrine of the *Schwimmer, Macintosh* and

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[34] See Hearings Before the Committee on Immigration and Naturalization, House of Rep., 76th Cong., 1st sess. on H.R. 6127, superseded by H.R. 9980; H. Rep. 2396, S. Rep. 2150, 76th Cong., 3rd sess.

Bland decisions. The first is found in Section 307 (a) of the Nationality Act of 1940, 8 U. S. C. 707 (a), which revised the former requirement (R. S. 2165) that the applicant must show that he "has behaved as a man * * * attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." This was changed to preclude naturalization unless the applicant established that during the prescribed periods he "has been and still is a person * * * attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." In the second change Congress specifically incorporated in Section 335(b) of the Nationality Act of 1940, 8 U. S. C. 735(b), the precise language of the oath of allegiance, which previously had been found only in the administrative regulations, and which had been interpreted by the court in the earlier decisions. These revisions hardly reveal any dissatisfaction with the construction of the statute adopted in the *Schwimmer, Macintosh* and *Bland* cases. On the contrary, they impress us as affirmative indications of approval.

In our opinion the evidence is overwhelming that Congress noticed and considered the rulings of this court which concluded that an applicant for naturalization must express without reservation his willingness to bear arms in defense of the United States (or, possibly, must undertake at least, if called, to serve in the armed forces as a noncom-

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batant), that it made no change in the relevant statutory provisions during an era when numerous other amendments to the naturalization laws were being enacted, that it rejected specific proposals to overcome the effect of the decisions by this court, and that it declined to disturb the existing requirements when it undertook the comprehensive codification which emerged as the Nationality Act of 1940. It seems to us that this entire course of conduct was a clear and positive expression of the legislative design and constituted an acquiescence in and ratification of the interpretations by this court. See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488-489; *Missouri* v. *Ross,* 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. Ry.,* 298 U. S. 492, 500; *United States* v. *Ryan,* 284 U. S. 167, 175; cf. *Helvering* v. *Winmill,* 305 U. S. 79, 82-83; *Helvering* v. *Hallock,* 309 U. S. 106, 119-120. As Chief Justice Stone said in the *Apex Hosiery Co.* case, 310 U. S. at 488-489:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute * * * has brought forth sharply conflicting views on the Court and in Congress, and where after the matter has been fully brought to the

attention of the public and the Congress, the latter has not seen fit to change the statute.

To complete this portrayal of the legislative attitude, the attention of the court is invited to the somewhat inconclusive developments following the *Girouard* decision. During the 79th and 80th Congresses several bills were introduced to modify the statute. On April 16, 1946, while the *Girouard* case was under consideration by this court and six days before announcement of its decision, Representative Dolliver introduced H. R. 6147, 79th Cong., 2d sess., which proposed an amendment to the Nationality Act requiring that an applicant for naturalization must undertake that "if required, he will bear arms in support and defense of the United States." H. R. 6531, 79th Cong., 2d sess., sought to accomplish the same result. No action was taken at that session. The following session brought a number of measures favoring similar amendments. H.R. 1118, H. R. 1191, H. R. 2286, H. R. 2444, 80th Cong., 1st sess. On March 18, 1948, H. R. 2286 was reported favorably by the House Committee on the Judiciary. H. Rep. 1575, 80th Cong., 2d sess. In its report the Committee indicated that this measure was actively sponsored by the American Bar Association and the American Legion. The report stated, at p. 4:

> The bill, if enacted would unequivocally state the intent of Congress. The words "if required", inserted by the Committee, mean that should requirements regarding selective

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> service be enacted by the Congress, such as exempting "conscientious objectors", naturalized citizens of that category would, of course, not be required to serve.

No action was taken on this proposed legislation by either House of Congress. It does not appear that similar bills have been introduced in the 81st Congress.

We suggest two possible explanations for this inaction by Congress. First, Congress was aware of and was satisfied with the administrative interpretation, now being tested in the instant case, that the effect of the *Girouard* decision was limited to persons who were willing to serve in the armed forces as noncombatants and did not alter the ineligibility of those who were unwilling to serve at all. Second, the Senate Judiciary Committee has been engaged in a study of the immigration and nationality laws, for the purpose of enacting a comprehensive revision and codification. See S. Rep. 503, 80th Cong., 1st sess.; S. Rep. 1390, 80th Cong., 2d sess.; S. Rep. 65, 81st Cong., 1st sess.; S. Doc. 3, 81st Cong., 1st sess. Few proposals to amend the immigration and naturalization laws have been enacted while that study has been in progress, particularly during the 81st Congress. We believe that these subsequent developments are not inconsistent with the very strong indications of legislative approval of the earlier decisions rendered by this Court.

III

Petitioner Has Not Satisfied the Requirements of the Naturalization Laws. Therefore He Is Unqualified for Naturalization

We turn now from a consideration of general principles to an examination of the facts. Cohnstaedt seeks the privilege of naturalization. Can it be said that he has fulfilled the terms upon which Congress conditioned such a grant? The naturalization court and the Supreme Court of Kansas both held that he had not. The findings of those courts should not be disturbed unless they clearly misconceived the facts or misapplied the law. We believe the courts below were right.

His own answers to the naturalization inquiry reveal the utter inadequacy of Cohnstaedt's approach to the obligations of American citizenship. R. 23-25, 13-17. He professes a conscientious opposition to all war, would not serve in the armed forces of the United States, even as a chaplain or medical corpsman, and would not consent to wear a military uniform. As a civilian he would not manufacture munitions or deliver them to the fighting men, nor would he contribute anything or render any service of which he was capable which might "be used solely and directly in furtherance of armed conflict." He might heed the Government's command to perform other duty during a period of emergency "which does not conflict with my Christian beliefs." He would help to remove

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wounded from a battlefield, but only if permitted to do so as a civilian. Whatever he did "would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort."

We do not think that a person who expresses such indifference to the nation's urgent need can satisfy the requirements of the naturalization laws. Nor do we believe that his willingness to proceed with his normal peacetime occupation in time of war, despite the possibility that such work might incidentally contribute to the defense of the United States against its enemies, can be compared with the sacrifices of those in military service, whether combatant or noncombatant.

We think it doubtful that such a person can fairly be described as attached to the principles of the Constitution and well disposed to the good order and happiness of the United States. But we do not think it even doubtful that such a person cannot in good faith take an oath to support and defend the Constitution of the United States against foreign enemies. It can be persuasively argued, as it was in the majority opinion in the *Girouard* case, that noncombatant members of the armed forces, merchant seamen, workers in war industry, all support and defend their country's institutions in time of war as truly as the combat infantryman. But if willingness to "support and defend * * * against

all enemies, foreign and domestic" be construed to include this petitioner's state of mind, then those words are deprived of the meaning which is normally given them and which Congress presumably intended them to have.

A. The Claim to Special Naturalization Status as a Consequence of Generous Treatment of Conscientious Objectors in Selective Service Legislation.

Petitioner urges, nevertheless, that the conscription legislation enacted by Congress consistently has accorded a special status to conscientious objectors and that he is claiming only the privileges which traditionally have been allowed by Congress. He asserts (Br., p. 8) that "Never in our history has Congress compelled a religious conscientious objector such as petitioner to enter the armed services." In our opinion the assumptions implicit in this contention are entirely fallacious. As we have indicated, there has been no uniform policy of Congress to excuse conscientious objectors from military service. There is no Constitutional requirement that Congress do so, and certainly there can be no guarantee that Congress would do so in any future emergency. Nor, assuming continued Congressional willingness to excuse conscientious objectors, can there be any guarantee that the agencies to which Congress commits the administration of such laws would treat this petitioner as a genuine

62 Stat. 609, 50 U.S.C. App., Supp. II, 456, passed during a time when conscripts were not so urgently needed, authorizes a full exemption from all service of conscientious objectors opposed to noncombatant military duty.[37] On the other hand, the 1948 Act no longer recognizes any special status for conscientious objectors on philosophical or moral grounds, limiting its dispensations to those whose opposition to military service is rooted in religious scruples. *Id.*

Petitioner thus cannot point to any consistent national policy regarding the military service of conscientious objectors, nor can he predict what Congress will prescribe during future emergencies. Most Americans have an abhorrence of war, but they are willing to subordinate their own personal inclinations to the common need. Petitioner is not willing to do this. He claims the right to define the terms under which he will consent to serve, as he insists on defining the terms under which he will accept naturalization. He thus wishes to reserve a right of private judgment, even, in the words of Dean Wigmore, of "private secession."[38] He in-

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or refused to comply with directives such as those ordering them to report to civilian camps. These were prosecuted and endured prison terms. See Elliff, *Prosecution of Conscientious Objectors under the Selective Service Act* (1944) 6 Fed. Bar Journ. 41. See also 4th Report of the Director of Selective Service (1948) pp. 175-186.

[37] For legislative history of this provision see S. Rep. 1268, H. Rep. 1881, and H. Conf. Rep. 2438, 80th Cong.

[38] See Wigmore, *United States* v. *Macintosh Symposium* (1931), 26 Ill. L.R. 375. See also discussion of the *Girouard* decision in (1947) 33 A.B.A. Journ. 95, 323, 540, 663.

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sists on making his own decisions during a time of emergency and is unwilling to trust to the generosity of Congress to make allowance for his conscientious scruples, if need arises to call upon him for aid in defense of the nation.

We cannot agree that the exemptions Congress may have permitted conscientious objectors in relation to selective service have any necessary relationship to their qualification for naturalization. Many reasons, in addition to a deference to religious scruples, may have motivated the allowance of such exemptions. For example, it is quite likely that Congress took into consideration the past difficulties experienced in dealing with religious dissenters.[39] It may have wished to avoid similar difficulties, which certainly were excessive in relation to the number of potential recruits involved. Recognizing that such persons would not be good soldiers, Congress doubtless sought a practical solution which would avoid disruption of military discipline. In our opinion the generosity of Congress in accommodating conscientious objectors who sought release from full military duty does not necessarily mean that Congress was eager to welcome them to the ranks of American citizenship. Congress may well have concluded that such persons would not be effective fighting men,[40] or even may have wished to

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[39] See *Statement Concerning the Treatment of Conscientious Objectors in the Army*, (War Dept. 1919).

[40] This Court in the *Girouard* case, 328 U.S. at 65, compared the disablement of the conscientious objector with that of one

defer to their scruples, without believing that it was desirable to encourage them and augment their numbers by admitting them to citizenship.[41] In any event, they have not been exempted from the general requirements of the naturalization laws. They have no right to naturalization if they cannot meet those qualifications.

B. The Claim to Full Equality with Native Born American Citizens.

It has been urged on other occasions that since the religious scruples of American citizens are granted bountiful recognition in the draft laws, a similar generosity must favor alien conscientious objectors who seek naturalization. There appear to be two obvious flaws in this argument. In the first place, few Americans would regard themselves as removed from the temporal demands of governmental authority, and few would insist upon a right to disregard measures adopted in furtherance of

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who is physically incapacitated. This implies doubt as to their usefulness in the ranks, rather than a high regard on the part of Congress for them as individuals. Also of interest is the history of S. 315, 78th Cong., 1st sess., introduced as a consequence of a resolution adopted at a convention of the American Legion. This bill, which was never enacted, sought to repeal the deferments to conscientious objectors allowed by the Selective Training and Service Act of 1940. The opposition to this measure, including the military authorities, emphasized that the provisions relating to conscientious objectors were desirable as a practical expedient. Hearings before H. Comm. on Military Affairs, pp. 14, 22, 23-24.

[41] Of course, not all alien residents are granted the privilege of naturalization. See p. 65, *infra*.

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national safety. Most citizens would be content to observe laws enacted by Congress to promote the common good.

Secondly, it is clear that an alien seeking citizenship cannot demand full equality of status with the citizen. Standing at the threshold and seeking admission to citizenship, the alien must meet every condition fixed by Congress. In many obvious respects his situation does not approximate that of the citizen. For example, our naturalization laws always have excluded, and to some extent still bar,[42] aliens of the Asiatic racial strains. Those restrictions repeatedly have been upheld. *United States v. Thind,* 261 U. S. 204; *Ozawa v. United States,* 260 U. S. 178; *Toyota v. United States,* 268 U. S. 402. But persons of Oriental descent who are citizens by birth are subject to no such disability. *United States v. Wong Kim Ark,* 169 U. S. 649. In any event, it seems entirely within the competence of Congress to insist that an alien who is about to renounce his fealty to a foreign sovereign should demonstrate the sincerity of his vows by showing affirmative attachment to the United States and by promising to aid the nation in its hour of need.

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[42] Sec. 303, Nationality Act of 1940, 8 U.S.C. 703.

C. The Claim That the Oath of Allegiance Taken Outside the Naturalization Process Never Has Been Regarded as Entailing a Promise of Military Service.

This argument relies on the close resemblance between the oath of allegiance administered to public officers, 5 U. S. C. 16, and that taken by naturalization applicants. It declares that the oath of the public officer never has been interpreted as assuming an obligation to perform military service. From this premise it urges that a like promise is not implicit in the naturalization oath.

It seems to us that this contention, which also has been advanced on other occasions, stems from a number of unsupportable assumptions. In the first place, the insufficient oath of allegiance is only one element in twin grounds for opposing naturalization; the other is the inability to establish attachment and favorable disposition to the United States. Secondly, this Court frequently has found that the same language can have varying meanings in different contexts. E. g., *Helvering v. Stockholms &c. Bank,* 293 U. S. 84, 86-88; *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, 433-434. The oath of the public officer relates primarily to the duties of his office; the oath of the naturalization applicant relates directly, on the other hand, to the broader duties of citizenship. Thirdly, the naturalization oath is taken in a judicial proceeding, and its implications consequently have been exam-

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ined by the courts. We are not aware of any such judicial inquiry regarding the scope of the public officer's oath. It is quite conceivable that in some future litigation, arising during a time of national peril, a person who will not undertake to aid in the nation's defense will be deemed disqualified to assume public office. Cf. *In re Summers, supra*; *Hamilton v. Regents, supra.* Fourthly, Article VI, cl. 3 of the United States Constitution, after prescribing the oath of office, specifies that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In the light of the *Summers* case, we certainly cannot concede that a requirement that the candidate be willing to assist in the national war effort could be regarded as a "religious test." It is self-evident that the mere fact that a qualification to public office may be inconsistent with some religious scruples does not make that qualification a "religious test." It is conceivable that religious beliefs might lead a man to preach and practice the overthrow of the Government by force and violence; but the fact that his reasons were religious would certainly not entitle him to take the oath of office. In any event, no comparable limitation inhibits the authority to fix the conditions governing naturalization. Finally, the *Girouard* case suggested that a conscientious objector inducted into the armed services as a noncombatant had to take an oath of allegiance, and offered this circumstance

as an indication that Congress intended a relaxation of the ordinary meaning of the oath in regard to this category of conscientious objectors. There is no evidence of any such relaxation with respect to conscientious objectors who will not serve in the armed forces in any capacity.

D. The Claim That the Requirements of the Statute Are Satisfied Since Petitioner Describes Himself as Attached to the United States and Asserts That He Is Willing to Take an Unqualified Oath of Allegiance

The short answer to this contention is that it begs the question. The petitioner's fitness for American citizenship is to be judged by the effect of his actions and attitudes in the light of the requirements of the statute, rather than by his own characterization of his qualifications. The opposition to his naturalization has sprung from his inability to meet the tests and standards prescribed by the naturalization statute itself. Congress has fixed those requirements, and petitioner cannot avoid their impact by a plea that they are offensive to his religious scruples. If those scruples bar him from fulfilling the conditions under which naturalization may be awarded, he must forego the privilege of naturalization.

The holding of the *Girouard* case cannot be read as sanctioning the naturalization of the instant petitioner. Girouard was willing to defend the United

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States in any capacity except in aggressive combat. The ruling in his case interpreted the commitment of the oath of allegiance to "support and defend" the United States as including the type of support he promised. Cohnstaedt, on the other hand, will not pledge any support to the nation. A ruling in his favor would ignore and render meaningless the undertaking of the oath of allegiance "to support and defend the United States against all enemies, foreign and domestic." It would thus go far beyond the *Girouard* case, would erode the requirements of the statute, and would tend to produce the confusion suggested by the prevailing opinion in the *Macintosh* case.

In no true perspective does this case involve the cherished rights to freedom of expression and religious belief. Petitioner may continue to enjoy those privileges within legal and Constitutional bounds as an alien resident of this country, but if he cannot comport with the rules laid down by Congress for admission into the society of United States citizenship he cannot complain if the benefits of citizenship are denied him.

The requirements of the naturalization laws here concerned were designed to preclude from citizenship those who were unwilling to assume what Congress regarded as the minimum responsibilities of a citizen. We believe that the contentions of the petitioner in the instant case represent an attempt to undermine those requirements. They challenge

the authority of Congress in a domain where its will must be paramount. In our view, the acceptance of those contentions ultimately would weaken the security of the nation and would depreciate the high value of American citizenship.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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FEBRUARY, 1950.

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DECISIONS PER CURIAM AND ORDERS FROM FEBRUARY 20 THROUGH JUNE 5, 1950.

FEBRUARY 20, 1950.*

Per Curiam Decisions.

No. 373. COHNSTAEDT *v.* IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 338 U. S. 890, to the Supreme Court of Kansas. Argued February 7, 1950. Decided February 20, 1950. *Per Curiam:* The judgment is reversed. *Girouard* v. *United States*, 328 U. S. 61. THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE CLARK dissent. *Osmond K. Fraenkel* argued the cause and filed a brief for petitioner. *L. Paul Winings* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Joseph W. Bishop, Jr.* and *Charles Gordon*. Reported below: 167 Kan. 451, 207 P. 2d 425.